No. 14-10078

Title:	Jaime Caetano, Petitioner
	v.
	Massachusetts
Docketed:	June 4, 2015
Lower Ct:	Supreme Judicial Court of Massachusetts
Case Nos.:	(SJC-11718)
Decision Date:	March 2, 2015

---Date---	-------Proceedings and Orders----------
Jun 1 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 6, 2015)
Jun 22 2015	Waiver of right of respondent Massachusetts to respond filed.
Jul 2 2015	DISTRIBUTED for Conference of September 28, 2015.
Jul 13 2015	Response Requested. (Due August 12, 2015)
Aug 10 2015	Order extending time to file response to petition to and including October 13, 2015.
Aug 11 2015	Brief amicus curiae of Arming Women Against Rape & Endangerment filed.
Aug 12 2015	Brief amicus curiae of Commonwealth Second Amendment filed.
Oct 13 2015	Brief of respondent Massachusetts in opposition filed.
Oct 27 2015	Reply of petitioner Jaime Caetano filed.
Oct 29 2015	DISTRIBUTED for Conference of November 13, 2015.
Nov 16 2015	DISTRIBUTED for Conference of November 24, 2015.
Nov 30 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 8 2015	Record Requested.
Dec 14 2015	Record received from the Supreme Judicial Court, Commonwealth of Massachusetts (1 envelope).
Dec 28 2015	DISTRIBUTED for Conference of January 8, 2016.
Jan 11 2016	DISTRIBUTED for Conference of January 15, 2016.
Jan 19 2016	DISTRIBUTED for Conference of January 22, 2016.
Feb 8 2016	DISTRIBUTED for Conference of February 19, 2016.
Feb 29 2016	DISTRIBUTED for Conference of March 4, 2016.
Mar 14 2016	DISTRIBUTED for Conference of March 18, 2016.
Mar 21 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion). Justice Alito, concurring in the judgment. (Detached opinion).
Apr 22 2016	MANDATE ISSUED
Apr 22 2016	JUDGMENT ISSUED
Jun 23 2016	Record from The Supreme Judicial Court, Commonwealth of Massachusetts has been returned.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 1410078

Supreme Court, U.S.
FILED
JUN 0 1 2015
OFFICE OF THE CLERK

COMMONWEALTH OF MASSACHUSETTS,
Respondent

V

JAIME CAETANO,
Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner in the above-entitled case moves pursuant to Rule 39 of the rules of this Court that she be permitted to proceed in forma pauperis. The petitioner has previously been granted leave to proceed in forma pauperis by the Massachusetts District Court and the Massachusetts Supreme Judicial Court. Undersigned counsel was assigned below to represent the petitioner pursuant to Mass. Gen. Laws c.211D, §5, and Rule 3:10 of the rules of the Supreme Judicial Court.

JAIME CAETANO

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Dated: June 1, 2015.

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QUESTIONS PRESENTED

A "stun gun" is a non-lethal electronic weapon invented in 1972 for individual self-defense in case of confrontation. Massachusetts is among those states that have made it a crime for a private citizen to possess a stun gun under any circumstances. The petitioner was convicted of violating Massachusetts' statute after being found in possession of an operable stun gun, which — it was undisputed below — she carried for purposes of self-defense in case of further confrontation with her abusive former partner. On appeal, the Supreme Judicial Court of Massachusetts affirmed the petitioner's conviction, rejecting on the merits her claims (1) that a stun gun is an "arm" protected by the Second Amendment, and (2) that Massachusetts' outlawing of stun guns violates the petitioner's Second Amendment rights under *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), and *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010). The questions presented are:

1. Is a stun gun an "arm" within the meaning of the Second Amendment?

2. Does Massachusetts' blanket prohibition on the possession of stun guns infringe the right of the people to keep and bear arms in violation of the Second and Fourteenth Amendments?

LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts affirming the petitioner's conviction appears at Appendix A and is reported at 470 Mass. 774, 26 N.E.3d 688 (2015).

The unpublished decision of the Massachusetts District Court denying the petitioner's pretrial motion to dismiss appears at Appendix C.

JURISDICTION

The date of the opinion and judgment of the Supreme Judicial Court of Massachusetts sought to be reviewed is March 2, 2015. This petition is filed on June 1, 2015, which is 90 days after the date of the Supreme Judicial Court's opinion, as computed and extended according to Rule 30.1 The Supreme Judicial Court of Massachusetts is the highest court of Massachusetts. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> . No State shall . . deprive any person of life, liberty, or property, without due process of law.

Chapter 140, §131J, of the Massachusetts General Laws provides:

> No person shall possess a portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill . . .
>
> * * * *
>
> Whoever violates this section shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less than 6 months nor more than 2 1/2 years, or by both such fine and imprisonment. A law enforcement officer may arrest without a warrant any person whom he has probable cause to believe has violated this section.

STATEMENT OF THE CASE

At about 3 p.m. on September 29, 2011, police officers responded to a call about a possible shoplifting at a supermarket in Ashland, Massachusetts. The supermarket manager pointed out the petitioner, who was seated in a motor vehicle in the parking lot outside the store, and told the officers that she may have been involved. The police approached the vehicle. Following a conversation with the officers, the petitioner consented to a search of her purse. Inside her purse, the petitioner had an operational stun gun. The petitioner told the police that the stun gun was for self-defense against her violent and abusive former partner. She was arrested for possession of a stun gun in violation of Mass. Gen. Laws ch. 140, §131J.

The petitioner challenged the constitutionality of §131J in a pretrial motion to dismiss. Relying on *District of Columbia* v. *Heller*,

554 U.S. 570 (2008), and *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), the petitioner asserted that a stun gun is an "arm" within the meaning of the Second Amendment, that it is primarily a weapon for individual self-defense and is currently in common use in the United States for that purpose, and that the petitioner kept and carried her stun gun for lawful self-defense in case of confrontation with her abuser. As such, she argued that her possession of the stun gun was protected by the Second and Fourteenth Amendments. The motion was denied. Appendix C.

At a jury-waived trial, the parties stipulated that the petitioner's stun gun was the sort of "portable [electronic] device or weapon" the possession of which is criminalized by §131J.[1/] The petitioner testified that the stun gun was for self-defense against her abuser, whom she had previously sought to keep at bay with restraining orders.[2/] The petitioner further testified that she had displayed the stun gun to fend off her abuser when confronted by him outside her place of

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[1/]Tasers deliver an electric shock through two wire-tethered "barbs," which can be propelled up to fifteen feet to penetrate the clothing or skin of the target. A stun gun (the kind of device borne by the petitioner) delivers its charge when it is held in direct contact with the target. Tasers and stun guns are both portable, hand-held devices. Both deliver a powerful electric shock that immediately incapacitates the target by causing uncontrollable muscle contractions, and are designed not to kill or injure. See *People* v. *Yanna*, 297 Mich. App. 137, 140 n.3, 824 N.W.2d 241, 243 n.3 (Mich. Ct. App. 2012); National Institute of Justice, Police Use of Force, Tasers and Other Less-Lethal Weapons, at 2 (May 2011) (NIJ Report) (http://www.ncjrs.gov/pdffiles1/nij/232215.pdf) (last visited May 27, 2015); Eugene Volokh, Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life, 62 Stan. L. Rev. 199, 204-209 (2009); Paul H. Robinson, A Right to Bear Firearms but Not to Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-lethal Weapons, 89 B.U.L. Rev. 251, 254-257 (2009).

[2/]Documentary proof of these restraining orders was submitted with the petitioner's motion to dismiss and admitted in evidence at trial.

employment, at a time when she was homeless and living in a "hotel."[3/]

The judge found the petitioner guilty of possession of a stun gun and placed the conviction "on file," i.e., without imposition of sentence. The petitioner initially consented to this disposition but later withdrew her consent and moved for sentencing to preserve her right of appeal under Massachusetts law. The judge again placed the conviction on file, over the petitioner's objection. The petitioner appealed. Following allowance of the petitioner's application for direct appellate review, the Supreme Judicial Court of Massachusetts (SJC) issued an opinion affirming her conviction. Appendix A.

As an initial matter, the SJC squarely rejected the Commonwealth's contention that the Court was without jurisdiction to hear the petitioner's appeal. *Commonwealth* v. *Caetano*, 470 Mass. 774, 776-777, 26 N.E.3d 688, 690 (2015). That contention rested on the state-law proposition that a conviction placed "on file" ordinarily "is not a judgment from which an appeal may be taken." *Id.*, citing *Commonwealth* v. *Delgado*, 367 Mass. 432, 438, 326 N.E.2d. 716, 719 (1975) (no appeal prior to judgment, "which in criminal cases is the

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[3/]The petitioner testified that she had sought to end the relationship after her abuser (with whom she had two children) put her "in the hospital," that, "in fear for [her] life," she accepted the stun gun from an acquaintance whom she met while homeless, and that her abuser thereafter "showed up at [her] job again" and "was waiting for [her] outside when [she] got out of work."

> "[H]e started screaming — like he usually did — . 'You're not gonna F'n work at this place' and 'You should be home with the kids. . ' I said, 'I'm not gonna take this anymore. Somebody . gave me this and I don't wanna have to do it to you, but if you don't leave me alone, I'm gonna have to.' And . he ended up leaving. He, I guess, got scared and left me alone."

The prosecutor did not cross-examine the petitioner, and, indeed, urged the trial judge to credit her testimony. Transcript of Massachusetts District Court bench trial, July 10, 2013, at 31, 35-36, 38, 40.

sentence"). Here, however, it was clear "that the [petitioner] wanted to pursue an appeal on the constitutionality of the criminal statute of which she was adjudged guilty, and that she withdrew her consent and moved for sentencing for that purpose." 470 Mass. at 777, 26 N.E.3d at 690. Because Massachusetts law recognizes that a criminal defendant has a right to appeal a conviction placed on file "without her consent," the SJC held that the conviction in the petitioner's case was properly before it for appellate review. *Ibid.*

On the merits, the SJC held that Massachusetts' blanket prohibition on stun guns "does not violate the Second Amendment right articulated in *Heller*," and "affirmed the [petitioner's] conviction of possession of an electrical weapon in violation of [Mass. Gen. Laws ch. 140, §131J]." 470 Mass. at 783, 26 N.E.3d at 695. In reaching this result, the SJC "acknowledge[d] that stun guns may have value for purposes of self-defense," 470 Mass. at 783, 26 N.E.3d at 695, but concluded that, *"[w]ithout further guidance from the Supreme Court on the scope of the Second Amendment,* [it would] not extend the Second Amendment right articulated by *Heller* to cover stun guns." *Id.* at 779, 26 N.E.3d at 692 (emphasis supplied).[4]

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[4] Art. 17 of the Massachusetts Declaration of Rights, which is Massachusetts' cognate constitutional provision to the Second Amendment, "previously has been held to encompass a collective, and not an individual, right to bear arms," *Commonwealth* v. *Caetano*, 470 Mass. at 778 n.4, 26 N.E.3d at 691 n.4, citing *Commonwealth* v. *Davis*, 369 Mass. 886, 888, 343 N.E.2d 847, 848-849 (1976), for which reason the petitioner's appeal to the SJC claimed a violation of her federal constitutional rights only.

REASONS FOR GRANTING THE PETITION

I.

STUN GUNS AND TASERS ARE NON-LETHAL, PORTABLE ELECTRONIC WEAPONS DESIGNED AND COMMONLY USED BY LAW ENFORCEMENT, THE MILITARY, AND LAW-ABIDING CITIZENS FOR SELF-DEFENSE IN CASE OF CONFRONTATION. *HELLER* STATES THAT THE SECOND AMENDMENT EXTENDS, "PRIMA FACIE," TO ALL SUCH "BEARABLE ARMS," EVEN IF THEY "DID NOT EXIST AT THE TIME OF THE FOUNDING." THE PETITION SHOULD BE GRANTED BECAUSE THE SJC'S OPINION CONFLICTS WITH *HELLER* ON THIS THRESHOLD CONSTITUTIONAL QUESTION, AND ALSO WITH THE TWO OTHER APPELLATE COURT DECISIONS TO HAVE CONSIDERED WHETHER STATE-LAW BANS OF WEAPONS LESS LETHAL THAN HANDGUNS SURVIVE *HELLER*.

The SJC's refusal — absent "further guidance from" this Court — to "extend the Second Amendment right articulated by [*District of Columbia* v.] *Heller* [, 554 U.S. 570 (2008),] to cover stun guns," *Commonwealth* v. *Caetano*, 470 Mass. 774, 779, 26 N.E.3d 688, 692 (2015), is bottomed on its conclusion that a stun gun is not "the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment." *Id.* at 777, 26 N.E.3d at 691. See also *id.* at 781, 26 N.E.3d at 693 ("[T]here can be no doubt that a stun gun was not in common use at the time of [the Second Amendment's] enactment. "; the "invention of this weapon [in 1972] clearly postdates the period relevant to our analysis").

This conception of the Second Amendment — as a sort of fossilized relic trapped in amber — permeates the SJC's opinion in this case, and is fundamentally at odds with what *Heller* teaches with respect to the threshold question whether the Second Amendment extends, prima facie, to a given instrument. In a critical passage, which the SJC does not reference, *Heller* states that what the Founders

meant by "Arms" is "no different from the meaning today." *Heller*, 554 U.S. at 581:

> Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).
>
> The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. . Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. *We do not interpret constitutional rights that way.* Just as the First Amendment protects modern forms of communications, e.g., *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo* v. *United States*, 533 U.S. 27, 35-36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding.*

Heller, 554 U.S. at 581-582 (emphases supplied).

Heller could not be clearer on the point that "Arms" — as that word appears in the Second Amendment — includes, prima facie, bearable weapons that came into existence after 1789. And, just like the modern "handgun" at issue in *Heller*, a stun gun is an instrument designed to be borne "for . defence, or to cast at or strike another." *Heller*, 554 U.S. at 581. See n.1, *ante* at 3 The SJC, however, validates the criminalizing of an entire class of "Arms" falling squarely within the plain language used by the Framers without even

acknowledging this Court's constitutional definition of what "instruments . constitute bearable arms" for purposes of Second Amendment analysis.

Untethered to *Heller*'s definitional mooring, the SJC reaches a result — that the "thoroughly modern" stun gun cannot be counted as an "arm" within the meaning of the Second Amendment, see 470 Mass. at 781, 26 N.E.3d at 694 — which conflicts directly with the only other reported case to have considered this precise question. See *People* v. *Yanna*, 297 Mich. App. 137, 140, 824 N.W.2d 241, 243 (Mich. Ct. App. 2012) (striking down Michigan statute criminalizing possession of portable electronic weapons: following *Heller*, the Second Amendment "protect[s] a citizen's right to possess and carry Tasers or stun guns for self-defense, and the state may not completely prohibit their use by private citizens").[5/] The SJC's opinion in this case also cannot be reconciled with *State* v. *DeCiccio*, 315 Conn. 79, 105 A.3d 165 (Conn. 2014), where, in an exceptionally thorough and thoughtful opinion, see *id.* at 108-150, 105 A.3d at 185-210, the Supreme Court of Connecticut recently read *Heller* to invalidate a Connecticut statute criminalizing the transport of dirk knives and police batons in a motor vehicle.[6/]

Stun guns obviously "were not in common use at the time of the Second Amendment's enactment," 470 Mass. at 781, 26 N.E.3d at 693, because they did not even exist until 1972. *Id.* The SJC finds this fact

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[5/]The SJC's opinion does not cite *Yanna*.

[6/]*DiCiccio* was decided three weeks after oral argument in the petitioner's case, and was brought to the SJC's attention by her post-argument letter (submitted pursuant to Rule 16(l) of the Massachusetts rules of appellate procedure). Appendix B. The SJC's opinion does not cite *DiCiccio*.

dispositive. But this Court "do[es] not interpret constitutional rights that way." *Heller*, 554 U.S. at 582. The petition should be granted because this case is the perfect vehicle for the Court to address the merits of how and why the Second Amendment applies, prima facie, to bearable arms that did not exist at the time of the founding.

II.

THE PETITION SHOULD BE GRANTED SO THE COURT CAN MAKE CLEAR THAT THE "CORE" OF THE SECOND AMENDMENT IS THE INDIVIDUAL RIGHT TO KEEP AND CARRY A BEARABLE INSTRUMENT — SUCH AS A STUN GUN — FOR SELF-DEFENSE IN CASE OF CONFRONTATION, AND THAT THIS RIGHT MAY EXIST OUTSIDE THE HOME.

Although stun guns did not exist in 1789, other portable self-defense weapons much less lethal than firearms, such as knives and billy clubs, were in common use at the time of the founding. See *State* v. *DeCiccio*, 315 Conn. at 117-118, 105 A.3d at 190-191.[7] And, like the modern handgun at issue in *Heller*, a stun gun may be kept in a location (such as a purse) "that is readily accessible in an emergency," and that may be utilized by "those without the upper-body strength to lift and aim" a heavier weapon. *Heller*, 554 U.S. at 629. Stun guns thus share many of the features — albeit virtually none of the lethality

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[7] "[B]ecause settlers during the revolutionary era used many of the same weapons for both personal and military defense, the term 'arms,' as contemplated by the constitutional framers, was not limited to firearms but included those hand-carried weapons commonly used for personal defense. . Thus, the term 'arms' 'includes weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon. . The appropriate inquiry is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era "

State v. *DeCiccio*, 315 Conn. at 117-118, 105 A.3d at 191, quoting *State* v. *Delgado*, 298 Ore. 395, 399, 692 P.2d 610, 612 (Or. 1984).

— that make handguns so popular as weapons of self-defense.

The SJC avoids all this by finding, for one reason or another, that the "conduct" underlying the petitioner's conviction falls outside "the 'core' of the Second Amendment.'" 470 Mass at 778, 26 N.E.3d at 691, quoting from *Hightower* v. *Boston*, 693 F.3d 61, 72 (1st Cir. 2012). In this respect, the SJC joins other post-*Heller* appellate decisions that have struggled to discern whether the "core" of the Second Amendment protects against anything other than the narrowest set of operative facts which can be gleaned from *Heller* itself, e.g, "legislation that works a complete ban on the possession of operable handguns in the home by law-abiding, responsible citizens for use in immediate self-defense." *Powell* v. *Tompkins*, 783 F.3d 332, ___, 2015 U.S. App. LEXIS 6149, *31 (1st Cir. 2015).

Here, the SJC says the petitioner's conviction falls outside the "core" of the Second Amendment:

(1) because stun guns would be deemed "dangerous per se" at common law, and therefore may be banned conformably with *Heller* pursuant to "the historical tradition of prohibiting carrying of 'dangerous and unusual' weapons," *id*. at 778-779, 26 N.E.3d at 691-692 (quoting *Heller*, 554 U.S. at 627),[8/]

[8/]The SJC does not explain why a stun gun — a weapon designed *not* to kill or maim and is "almost never fatal," Volokh, *supra*, Nonlethal Self-Defense, 62 Stan. L. Rev. 204 — could be banned in accord with *Heller* as an "instrumentality designed and constructed to produce death or great bodily harm," 470 Mass. at 779, 26 N.E.3d at 692 (citations omitted), while handguns, which "cause well over 60,000 deaths and injuries in the United States each year," *McDonald* v. *City of Chicago*, 561 U.S. at 924 (Breyer, J., dissenting), are the "quintessential self-defense weapon" for Second Amendment purposes. *Heller*, 554 U.S. at 629. See also NIJ Report, *supra* at 2 ("A study by Wake Forest University researchers found that 99.7 percent of people who were shocked by [conducted energy devices such as stun guns and Tasers] suffered no injuries or minor injuries only"); *State* v. *DeCiccio*, 315 Conn. at 121, 105 A.3d at 193 ("As to whether dirk knives are 'dangerous and unusual weapons,' . . . and, therefore,

(FOOTNOTE CONTINUED ON NEXT PAGE)

(2) because stun guns were not "in common use" in 1789, 770 Mass. at 779, 26 N.E.3d at 692,[9]

(4) because the "number of Tasers and stun guns is dwarfed by the number of firearms" currently in circulation, *id.* at 781, 26 N.E.3d at 694 (quoting petitioner's pretrial motion to dismiss),[10]

(5) because "there is nothing in the record to suggest that [stun guns] . are readily adaptable to use in the military," *id.* at 781, 26 N.E.3d at 694,[11] and, finally,

(6) because, the petitioner, when she was arrested, was not "using the stun gun to defend herself in her home. . . ." *Id.* at 779, 26 N.E.3d at 692.

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[9](FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
not 'arms' within the meaning of the [S]econd [A]mendment, their more limited lethality relative to other weapons that, under *Heller*, fall squarely within the protection of the [S]econd [A]mendment — e.g., handguns — provides strong support for the conclusion that dirk knives also are entitled to protected status").

[9]See Argument I, *ante*, at 6-9. Moreover, like his knife or his club, the 18th-century militiaman might well have brought his stun gun to the muster (if he had one to bring), as evidenced by their rapidly increasing popularity among "law enforcement and military agencies." NIJ Report, *supra*, at 1. See also n. 7, *ante*, at 9. Cf. *Caetano*, 470 Mass. at 780 n.5, 26 N.E.3d at 693 n.5 (suggesting that a weapon cannot count as an "arm" unless it was in common use in 1789 for self-defense in the home *and* "typically used by militiamen") (citing *State* v. *Kessler*, 289 Ore. 359, 368, 614 P.2d 94 (1980)).

[10]The Second Amendment is not a popularity contest. In any event, Tasers and stun guns are legal in most states, see *People* v. *Yanna*, 297 Mich. App. at 144, 824 N.W.2d at 245, and "[h]undreds of thousands of [them] have been sold to private citizens, with many more in use by law enforcement officers." *Id.* See also Volokh, *supra*, Nonlethal Self-Defense, 62 Stan. L. Rev. at 200, 244 (listing Massachusetts as one of seven states that outlaw the possession of stun guns by law-abiding citizens). As to the number or prevalence of stun guns in Massachusetts, a state should not be permitted to make a self-defense weapon relatively scarce by declaring it to be contraband and then use that state-created scarcity to label the instrument "unusual" for purposes of Second Amendment analysis.

[11]The SJC did not notice the NIJ Report, supra, at 1 ("More than 15,000 law enforcement and military agencies use" Tasers and other portable electric self defense weapons). See also Executive Office of Public Safety and Security, Annual Electronic Weapons Use Analysis: A Summary of Electronic Weapons Use in Massachusetts, at Appendix A (July 2010) (listing sixty-one Massachusetts law enforcement agencies authorized to use conducted energy devices) (available at http://www.mass.gov/eopss/docs/chsb/firearms/ew-quarterly-report-data-analysis.pdf) (last visited May 29, 2014).

In the petitioner's view, the SJC's analysis of the first five factors, *supra*, which it says remove stun guns from the "core" of the Second Amendment is confused by its failure to address as a threshold matter whether stun guns are "instruments that constitute bearable arms," notwithstanding the fact that they "were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. As to the sixth factor, however, the SJC is quite correct that *Heller* interprets the Second Amendment as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635, "'*where the need for defense of self, family, and property is most acute.*'" 470 Mass. at 778, 26 N.E.3d at 691 (quoting *Heller*, 554 U.S. at 628) (emphasis added by the SJC). The SJC also correctly observes that the petitioner was not "using her stun gun to defend herself in her home" at the moment she was arrested for violating Massachusetts' prohibition on the possession of stun guns by otherwise law-abiding citizens.

This, however, is precisely where the SJC's reading of *Heller* goes most seriously awry. The petitioner was a homeless victim of domestic violence. When restraining orders did not work, she carried a stun gun — a non-lethal instrument designed for individual self-defense, and typically possessed by law-abiding citizens in states other than Massachusetts for that purpose. She had displayed the stun gun to successfully fend off her abuser when he confronted her outside her job. The SJC's approach would render all of these undisputed facts irrelevant for Second Amendment purposes on the rationale that the petitioner happened to be arrested in the parking lot of a supermarket

rather than in a "home" she did not have.

The Second Amendment "guarantee[s] the individual right to possess and carry weapons *in case of confrontation*." *Heller*, 554 U.S. at 592 (emphasis added). "Individual self-defense is 'the *central component*' of the Second Amendment" itself. *McDonald*, 561 U.S. at 767, quoting *Heller*, 554 U.S. at 599 (emphasis in *Heller*). Although the "need" for self-defense may be "most acute" inside the home, *Heller*, 554 U.S. at 628, it cannot be that the right itself simply evaporates at the threshold. Confrontations are not limited to the home. Judge Posner illustrated the point in terms that apply, almost word for word, to this case:

> A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to [bear arms] in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.

Moore v. *Madigan*, 702 F.3d 933, 937 (7th Cir. 2012).[12]

This case presents the question whether the Second and Fourteenth Amendments permit a state to outlaw the mere possession of a stun gun, not whether stun gun ownership may be reasonably regulated. Because the statute in question "prohibit[s] a class of weapons entirely," 470 Mass. at 779, 26 N.E.3d at 692, the approach

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[12] In *Moore* v. *Madigan*, the Seventh Circuit held that an Illinois statute which came "close to" banning the public carrying of loaded handguns was unconstitutional, because *Heller*'s reading of the Second Amendment cannot logically be restricted to the home, and because there was no "more than merely a rational basis" for believing that such a ban would increase public safety. 702 F.3d at 939-942.

taken by the SJC would afford the petitioner no Second Amendment protection even if she had been arrested for possessing a stun gun while in the act of fending off her abuser inside whatever place she called "home." For this reason, the statute in question cannot survive anything more than "rational-basis scrutiny," *Heller*, 554 U.S. at 628 n.27, and the SJC's proffered reasons why legislators might reasonably decide to ban stun guns, 470 Mass. at 781-782, 26 N.E.3d at 694, are entirely beside the point.

* * *

In a parting shot, the SJC says its affirmance of the petitioner's conviction will not "affect[] [her] right to bear arms" because, "[b]arring any cause for disqualification," she "could have applied for a licence to carry a firearm," or carried mace or pepper spray instead. 470 Mass. at 783, 26 N.E.3d at 695 (citing Mass. Gen. Laws c.140, §§122D and 129B). Cold comfort. The statutes cited deem the petitioner to now be a "prohibited person" who is disqualified as a result of the conviction affirmed below from ever obtaining a firearm license, or from purchasing or possessing self-defense spray.[13] The petition should be granted because, by reaching a result that violates the petitioner's Second Amendment right to bear arms in case of confrontation, the SJC renders its own suggested state-law self-defense alternatives infeasible.

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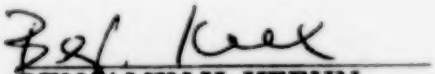
[13] Section 129B prohibits the issuance of a firearm license to any person who "has ever . been convicted . of, a felony ; a misdemeanor punishable by imprisonment for more than 2 years [, or] . ; a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed." Section 122D states that "[n]o person shall purchase or possess self-defense spray who has been convicted" of the same types of crimes identified in section 129B.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: June 1, 2015.

APPENDIX A

Commonwealth v. Caetano

Supreme Judicial Court of Massachusetts

December 2, 2014, Argued; March 2, 2015, Decided

SJC-11718

Reporter
470 Mass. 774; 26 N.E.3d 688; 2015 Mass. LEXIS 103

COMMONWEALTH *vs.* JAIME CAETANO.

PRIOR HISTORY: [***1] Middlesex.. COMPLAINT received and sworn to in the Framingham Division of the District Court Department on September 30, 2011.

A motion to dismiss was heard by *Robert V. Greco*, J.; the case was heard by *Martine G. Carroll*, J., and a motion for sentencing was considered by her.

The Supreme Judicial Court granted an application for direct appellate review.

Counsel: *Benjamin H. Keehn*, Committee for Public Counsel Services, for the defendant.

Michael A. Kaneb, Assistant District Attorney, for the Commonwealth.

Keith G. Langer, for Commonwealth Second Amendment, amicus curiae, submitted a brief.

[*775] *Eugene Volokh*, of California, *Michael E. Rosman & Michelle A. Scott*, of the District of Columbia, *& Lisa J. Steele*, for Arming Women Against Rape & Endangerment, amicus curiae, submitted a brief.

Judges: Present: Gants, C.J., Spina, Cordy, Botsford, Duffly, Lenk, & HINES, JJ.

OPINION BY: SPINA

Opinion

[**689] SPINA, J. The defendant, Jaime Caetano, asks us to interpret the holdings of the United States Supreme Court in *McDonald* v. *Chicago*, 561 U.S. 742, 791, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), and *District of Columbia* v. *Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), to afford her a right under the Second Amendment to the United States Constitution to possess a stun gun in public for the [***2] purpose of self-defense. The defendant was arrested for possession of a stun gun in a supermarket parking lot, claiming it was necessary to protect herself against an abusive former boy friend. She now challenges the constitutionality of G. L. c. 140, § 131J, which bans entirely the possession of an electrical weapon with some exceptions not applicable here. We hold that

a stun gun is not the type of weapon that is eligible for Second Amendment protection, see *Heller, supra* at 622, and we affirm the defendant's conviction.[1]

1. *Background.* At approximately 3 P.M. on September 29, 2011, Ashland police officers responded to a call about a possible shoplifting at a supermarket. The manager of the supermarket had detained someone in the store, and he informed police that the defendant and a man with whom she left the store also may have been involved. The manager pointed to a man standing next to a motor vehicle in the parking lot outside the supermarket. The defendant was seated in the vehicle. Officers approached it. Following a conversation [***3] with officers, the defendant consented to a search of her purse. Inside the purse, the defendant had an operational stun gun.[2] The defendant told police that the stun gun was for self-defense against a former boy friend. Police charged her with possession of a stun gun in violation of G. L. c. 140, § 131J.[3]

[**690] The defendant challenged the constitutionality of § 131J in a [*776] pretrial motion to dismiss. She argued that the stun gun is an "arm" for purposes of the Second Amendment, that it is a weapon primarily for self-defense and in common use in the United States for that purpose, and that she kept her stun gun for purposes of self-defense. As such, she argued that her possession of the stun gun was protected by the Second Amendment. The motion was denied.

At a jury-waived trial, the parties stipulated that the device in question was a stun gun regulated by G. L. c. 140, § 131J. The defendant testified that the stun gun was for self-defense against a former boy friend. She further testified that her former boy friend was violent, and that previously she had displayed the stun gun during a confrontation with him. She said that she had been homeless and living in a hotel. The judge found the defendant guilty of possession of the stun gun and placed the case on file. The defendant consented to having the case placed on file. Approximately two and one-half months later the defendant filed a written [***5] objection to the case being placed on file, and she moved for sentencing.

A hearing was held on the motion. The Commonwealth recommended the imposition of the minimum fine. The defendant proposed a fine less than the minimum. Both the Commonwealth and the judge recognized that the purpose of the hearing was to preserve the defendant's right of appeal. After discussion, the judge again placed the case on file over the defendant's objection in the belief that this action would preserve the defendant's right of appeal.

The defendant filed a timely notice of appeal. We granted her application for direct appellate review.

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[1] We acknowledge the amicus briefs submitted by Commonwealth Second Amendment and Arming Women Against Rape & Endangerment in support of the defendant.

[2] The stun gun was a black electronic device with two metal prongs and a switch. Once the switch was thrown, an electrical current appeared between the prongs. Stun guns are designed to stun a person with an electrical current after the prongs are placed in direct contact with the person and the switch is thrown.

[3] General Laws c. 140, § 131J, forbids the private possession of a "portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill" except by specified public officers or suppliers of such devices, if possession is "necessary to the supply or sale of the device or weapon" to agencies utilizing it. Violation of this section is punishable "by a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less [***4] than [six] months nor more than [two and one-half] years, or by both such fine and imprisonment." *Id.*

2. *Appellate jurisdiction*. As an initial matter, the Commonwealth argues that this appeal is not properly before the court. The basis of this argument is that no judgment resulted from the defendant's conviction because a conviction placed on file is not a judgment from which an appeal may be taken. Generally, a judgment in a criminal case is the sentence, and a defendant has no right of appeal until after the sentence is imposed. See *Com-* [*777] *monwealth* v. *Ford*, 424 Mass. 709, 713 n.2, 677 N.E.2d 1149 (1997) (conviction placed on filed suspends defendant's right to appeal alleged error in proceeding); [***6] *Commonwealth* v. *Delgado*, 367 Mass. 432, 438, 326 N.E.2d 716 (1975) (no appeal until after judgment "which in criminal cases is the sentence"). See also Mass. R. Crim. P. 28 (e), 453 Mass. 1501 (2009) (court may file case after guilty verdict without imposing sentence).

We have recognized that a defendant has a right to appeal a conviction on file without her consent. *Delgado, supra*. It was clear to all involved that the defendant wanted to pursue an appeal on the constitutionality of the criminal statute of which she was adjudged guilty, and that she withdrew her consent and moved for sentencing for that purpose. We conclude that the defendant may proceed with her appeal. See *id*.

3. *Discussion*. Where we must determine whether the Massachusetts ban on [**691] stun guns violates the Second Amendment, we are bound by decisions of the United States Supreme Court on the matter. The Supreme Court recently interpreted the Second Amendment in a historical context that focused on the meaning of various words and phrases in the amendment as they probably were understood and used by Congress at the time of the Second Amendment's enactment. In accord with that analysis we must determine whether a stun gun is the type of [***7] weapon contemplated by Congress in 1789 as being protected by the Second Amendment.

In *Heller*, 554 U.S. at 635, the United States Supreme Court held that "[a] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." The Court in *Heller* was confronted with a total ban on handgun possession in the home, and a further requirement that any lawful firearm kept in the home be rendered inoperable. *Id*. at 628. The Court reasoned that

> "the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. *The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute*. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home [*778] 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' ... would fail constitutional muster." (Footnote omitted; emphasis [***8] added.)

Id. at 628-629, quoting *Parker* v. *District of Columbia*, 478 F.3d 370, 400, 375 U.S. App. D.C. 140 (D.C. Cir. 2007). The Supreme Court extended this interpretation of the Second Amendment to the States in *McDonald*, 561 U.S. at 791. The defendant now urges that the outright prohibition on the private possession of stun guns in Massachusetts violates the right articulated in *Heller*.[4]

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[4] At issue here is only the applicability of the Second Amendment to the statute. The cognate Massachusetts constitutional provision, art. 17 of the Massachusetts Declaration of Rights, previously has been held to encompass a collective, and not an individual, right to bear arms. See *Commonwealth* v. *Davis*, 369 Mass. 886, 888, 343 N.E.2d 847 (1976). The *Heller* Court, before reaching its conclusion,

"Since *Heller*, '[c]ourts have consistently recognized that *Heller* established that the possession of operative [***9] firearms for use in defense of the home constitutes the 'core' of the Second Amendment.'" *Commonwealth* v. *McGowan*, 464 Mass. 232, 235, 982 N.E.2d 495 (2013), quoting *Hightower* v. *Boston*, 693 F.3d 61, 72 (1st Cir. 2012). Moreover, the Supreme Court said in *Heller* that the Second Amendment individual right to keep and bear arms is "not unlimited." 554 U.S. at 595. The Court identified certain examples of lawful prohibitions and limitations on the Second Amendment right including, but not limited to, "prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626. In addition to the lawfulness of prohibitions against possession of arms by certain persons, the Court recognized the existence of

> [**692] "another important limitation on the right to keep and carry arms. [*United States* v.] *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' ... We think that limitation is fairly supported by the historical tradition of prohibiting carrying of 'dangerous and unusual weapons.'"

Heller, supra at 627, quoting *United States* v. *Miller*, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939).

[*779] The conduct at issue in this case falls outside the "core" of the Second Amendment, [***10] insofar as the defendant was not using the stun gun to defend herself in her home, see *Hightower*, 693 F.3d at 72 & n.8, quoting *Heller*, 554 U.S. at 627, and involves a "dangerous and unusual weapon" that was not "in common use at the time" of enactment. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the [Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller, supra* at 626. Without further guidance from the Supreme Court on the scope of the Second Amendment, we do not extend the Second Amendment right articulated by *Heller* to cover stun guns.

Here, we are concerned not with ensuring that designated classes of people do not gain access to firearms or weapons generally, but rather with prohibiting a class of weapons entirely. The traditional prohibition against carrying dangerous and unusual weapons is not in dispute. See *Heller*, 554 U.S. at 627, citing 4 Blackstone 148-149 (1769).

The question of the dangerousness of a weapon is well fixed in the common law through the distinction drawn between weapons that are dangerous per se and those that are dangerous [***11] as used. See *Commonwealth* v. *Appleby*, 380 Mass. 296, 303, 402 N.E.2d 1051 (1980) (setting out common-law definitions of dangerous weapons). See also *Commonwealth* v. *Wynton W.*, 459 Mass. 745, 748-755, 947 N.E.2d 561 (2011) (analyzing term "dangerous weapon" in context of G. L. c. 269, § 10 [*j*], barring possession of dangerous weapons on school grounds). At common law, a weapon is dangerous per se if it is an "instrumentality designed and constructed to produce death or great bodily harm" and "for the purpose of bodily assault or defense." *Appleby, supra* at 303. Weapons of this type include "firearms, daggers, stilettos and brass knuckles" but not "pocket knives, razors, hammers, wrenches and cutting tools." *Id.* The weapons not so classified all share the same characteristic: they were

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first conducted a survey of Second Amendment jurisprudence. *District of Columbia* v. *Heller*, 554 U.S. 570, 576-628, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). In so doing, the Court concluded that the Second Amendment secured an individual right to bear arms for defensive purposes. *Id.* at 602. We therefore view the defendant's claim only through the lens of the Second Amendment.

designed primarily as tools and only secondarily utilized as weapons. The Court in *Heller* confirms this method of analysis in discussing *Miller*, 307 U.S. at 178. See *Heller*, 554 U.S. at 622 (*Miller* decision concerned with design or "type of weapon at issue" and not use [emphasis omitted]).

The statute at issue here explicitly prohibits "a portable device or weapon from which an electrical current, impulse, [***12] wave or [*780] beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure, or kill." G. L. c. 140, § 131J. From this statutory definition, we easily conclude that any weapon regulated by § 131J would be classified as dangerous per se at common law. The parties have stipulated that the stun gun at issue here falls within the purview of § 131J and is a weapon. Accordingly, we consider the stun gun a per se dangerous weapon at common law. The record demonstrates no evidence or argument that its purpose is for anything other than "bodily [**693] assault or defense." *Appleby*, 380 Mass. at 303.

We turn next to the question whether a weapon is unusual. Historically, when considering challenges to the ban of dangerous and unusual weapons under the Second Amendment or equivalent State statutes, courts have asked whether the weapon in question is unusual by ascertaining if it is a weapon of warfare to be used by the militia. See *Hill* v. *State*, 53 Ga. 472, 474-477 (1874); *Aymette* v. *State*, 21 Tenn. 154, 158-160 (1840); *English* v. *State*, 35 Tex. 473, 476-477 (1871); *State* v. *Workman*, 35 W. Va. 367, 372-374, 14 S.E. 9 (1891). The Supreme Court utilized this approach in *Miller*, 307 U.S. at 178, [***13] and approved its use in *Heller*. The Court said,

> "'In the colonial and revolutionary war era, [small-arms] weapons used by militia men and weapons used in defense of person and home were one and the same.' *State* v. *Kessler*, 289 Ore. 359, 368, 614 P.2d 94 ... (1980) (citing G. Neumann, Swords and Blades of the American Revolution 6-15, 252-254 [1973]). Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[5]

Heller, 554 U.S. at 624-625. Thus, the questions whether a weapon is "unusual" and whether the weapon was "in common use at the time" of enactment are interrelated. *Id.* at 627-628.

The ban on the private possession of stun guns will not burden conduct that [***14] falls within the scope of the Second Amendment if [*781] a stun gun is a weapon not "in common use at the time" of enactment of the Second Amendment and would be dangerous per se at common law without another, primary use, i.e., as a tool. See *Heller*, 554 U.S. at 624-625, 627, quoting *Miller*, 307 U.S. at 179. For reasons that follow, there can be no doubt that a stun gun was not in common use at the time of enactment, and it is not the type of weapon that is eligible for Second Amendment protection. See *Heller*, *supra* at 622.

The record is silent as to the development of the stun gun. The record indicates only that stun guns have been available commercially for private purchase since the early 1990s. We note that the first patent for stun gun was filed in 1972. See Weapon for Immobilization and Capture, U.S. Patent No. 3,803,463

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[5] In *State* v. *Kessler*, 289 Ore. 359, 368, 614 P.2d 94 (1980), the Oregon Supreme Court described the type of weapons typically used by militiamen in defense of home *and* for purposes of the militia as being a musket or rifle, a hatchet, sword and knife or pike (a long shaft with a spear head).

(filed July 10, 1972). The recent invention of this weapon clearly postdates the period relevant to our analysis. We therefore conclude that stun guns were not in common use at the time of the Second Amendment's enactment. A stun gun also is an unusual weapon. In her motion to dismiss the complaint against her, the defendant acknowledged that the "number of Tasers [***15] and stun guns is dwarfed by the number of firearms." Moreover, although modern handguns were not in common use at the time of enactment of the Second Amendment, their basic function has not changed: many are readily adaptable to military use in the same way that their predecessors were used prior to the enactment. A stun gun, by contrast, is a thoroughly modern [**694] invention. Even were we to view stun guns through a contemporary lens for purposes of our analysis, there is nothing in the record to suggest that they are readily adaptable to use in the military. Indeed, the record indicates "they are ineffective for ... hunting or target shooting." Because the stun gun that the defendant possessed is both dangerous per se at common law and unusual, but was not in common use at the time of the enactment of the Second Amendment, we conclude that stun guns fall outside the protection of the Second Amendment. See *Heller*, 554 U.S. at 622, 627.

The question remains whether the total ban on stun guns has a rational basis. Those who challenge the constitutionality of a statute that burdens neither a suspect group nor a fundamental constitutional right bear a heavy burden in overcoming the presumption [***16] of constitutionality in favor of the statute's validity. See *English* v. *New England Med. Ctr., Inc.*, 405 Mass. 423, 427, 541 N.E.2d 329, cert. denied, 493 U.S. 1056, 110 S. Ct. 866, 107 L. Ed. 2d 949 (1989). Such is the case before us. For due process claims, the test under "the Federal Constitution is [*782] 'whether the statute bears a reasonable relation to a permissible legislative objective' ... and, under the ... State Constitution [is] whether the statute 'bears real and substantial relation to public health, safety, morals, or some other phase of the general welfare'" (citations omitted). *Id.* at 430. For equal protection claims, the test is the same under both Constitutions, namely, whether the statute is "rationally related to the furtherance of a legitimate State interest" (citations omitted). *Id.* at 428. Under the State Constitution the test also "includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Id.* at 429, quoting *Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (Stevens, J., concurring). The defendant does not challenge the statute on the basis of any [***17] group classification. We therefore focus on the challenge under principles of due process.

The defendant does not articulate any basis for challenging the statute under the rational basis test. Nevertheless, we note that stun guns deliver a charge of up to 50,000 volts. They are designed to incapacitate a target by causing disabling pain, uncontrolled muscular contractions, and general disruption of the central nervous system. See Amnesty International, Less than Lethal? Use of Stun Weapons in U.S. Law Enforcement, 1-2, 6-7 & nn.17, 18 (2008), available at https://www.amnesty.org/download/Documents/52000/amr510102008en.pdf [https://perma.cc/JK53-XMR3] (last visited February 26, 2015). It is difficult to detect clear signs of use and misuse of stun guns, unlike handguns. Stun guns can deliver repeated or prolonged shocks without leaving marks. *Id.* at 1-2. The Legislature rationally could ban their use in the interest of public health, safety, or welfare. Removing from public access devices that can incapacitate, injure, or kill a person by disrupting the central nervous system with minimal detection is a classic legislative basis supporting rationality. It is immaterial that the Legislature [***18] has not banned weapons that are more lethal. Mathematical precision by the

Legislature is not constitutionally required. See *Commonwealth* v. *McQuoid*, 369 Mass. 925, 927-928, 344 N.E.2d 179 (1976). The statute easily passes the rational basis test under both the Federal and State Constitutions.

[695]** *Self-defense when homeless.* Although we already have concluded that the defendant's possession of a stun gun was in violation of a statute regulating a weapon not protected by the Second Amendment, we touch briefly on her claim that her **[*783]** homelessness at the time of her arrest should not deprive her of her right to defend herself. As noted above, the Supreme Court's holding in *Heller* stressed the particular importance of the right to defend hearth and home as the core of the Second Amendment. See *Hightower*, 693 F.3d at 72 & n.8 (noting emphasis in *Heller* on "hearth and home" and subsequent interpretations). A homeless person may indeed have a home for constitutional purposes, and this question must be determined on a case-by-case basis. For example, constitutional protections against unreasonable search and seizure can be extended to a variety of living situations. See *Commonwealth* v. *Porter P.*, 456 Mass. 254, 260-261, 923 N.E.2d 36 (2010) **[***19]** (holding reasonable expectation of privacy exists in transitional living space); *Commonwealth* v. *Paszko*, 391 Mass. 164, 184-185, 461 N.E.2d 222 (1984) (hotel room during rental period). However, where a stun gun itself is not a type of weapon the possession of which is protected under the Second Amendment, we need not decide whether a hotel room may be treated as a home under the Second Amendment. Moreover, the stun gun was found not in the defendant's hotel room but on her person in a motor vehicle, outside the "core" of the Second Amendment.

Finally, neither the legislative ban on stun guns nor our decision affects the defendant's right to bear arms under the Second Amendment. Barring any cause for disqualification the defendant could have applied for a license to carry a firearm. See G. L. c. 140, §§ 129B, 131 (*c*). In addition, again barring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license. See G. L. c. 140, § 122D, inserted by St. 2014, c. 284, § 22. We hold only that the defendant's weapon of choice, the stun gun, is not protected by the Second Amendment. We acknowledge that stun guns may have value for purposes of self-defense, but because **[***20]** they are not protected by the Second Amendment and because a rational basis exists for their prohibition, the lawfulness of their possession and use is a matter for the Legislature.

Conclusion. For the reasons stated above, we hold that G. L. c. 140, § 131J, does not violate the Second Amendment right articulated in *Heller*. We affirm the defendant's conviction of possession of an electrical weapon in violation of G. L. c. 140, § 131J.

So ordered.

APPENDIX B

The Commonwealth of Massachusetts

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December 17, 2014

Francis V Kenneally
Clerk, Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 2500
Boston, MA 02108

RE: Commonwealth v. Jaime Caetano
No. SJC-11718

Dear Clerk Kenneally:

The above-captioned case was argued on December 2, 2014, and is under advisement.

Pursuant to Mass. R. A. P. 16 (l), as amended, 386 Mass. 1247 (1982), I write to bring the Court's attention to State v. DeCiccio, 315 Conn. 113 (2014) (unofficially released December 16, 2014) (available at http://jud.ct.gov/external/supapp/Cases/AROcr/CR315/315CR113.pdf) (copy attached at Add. 2-Add. 48).

In DeCiccio, the Connecticut Supreme Court held that police batons and dirk knives are "Arms" within the ambit of the Second Amendment, see Add. 18-29 & nn. 23-39 at Add. 41-45, and that a Connecticut statute which criminalizes the transporting of such weapons between homes infringes the Second Amendment right of law-abiding persons, such as the defendant DeCiccio, to keep and bear arms. See Add. 29-37 & nn.40-48 at Add. 45-48.

DeCiccio is "pertinent and significant authorit[y]," Mass. R. A. P. 16 (l), for Jaime Caetano's arguments that "Stun guns are 'Arms' within the ambit of the Second Amendment" (Defendant's brief at 9-13), and that G.L. c.140, §131J is

"invalid under any standard of heightened constitutional scrutiny because it bans 'an entire class of "arms"' whose possession is protected by the Second Amendment" (Defendant's brief at 13-19).

Respectfully submitted,

Benjamin H. Keehn
Attorney for Jaime Caetano

Certificate of Service

I certify that I have this date caused to be mailed, first-class and postage pre-paid, a copy of the foregoing letter, with addendum, to ADA Michael A. Kaneb, Office of the District Attorney, Middlesex County, 15 Commonwealth Avenue, Woburn, MA 01801.

Benjamin H. Keehn
BBO #542006

APPENDIX C

Commonwealth of Massachusettss

Middlesex,ss. Framingham District Court

No. 1149-CR-2522

Commonwealth

v.

Jaime Caetano

Ruling on Motion to Dismiss

The defendant was charged with possession of an electric stun gun, and has moved to dismiss this charge on the grounds that prohibiting such possession violates the defendant's Second Amendment right to bear arms as well as Article 17 of the Massachusetts Declaration of Rights. At the outset it is recognized that the Second Amendment applies to the states (see *McDonald v City of Chicago*, 130 Supreme Court, 3020, (2010).

With some exceptions that do not apply here, G.L. c. 140, s 131J provides that "[n]o person shall possess a portable device or weapon from which an electronic current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill". On the other hand, under G. l. c. 140, s 121, a firearm is defined as "a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged," but does not "include any weapon that is . . . constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette packages, . . . or not detectable as a weapon or potential weapon by X-ray machines commonly used at airports or

walk-though metal detectors."

The defendant relies heavily on Michigan's interpretation of the right to keep and bear arms' as covering weapons other than guns, noting that the Michigan law "does not include ordinary guns, *swords*, revolvers, or other weapons usually relied upon by good citizens for defense and pleasure." (Emphasis in original.) *People v. Brown*, 253 Michigan, 537, 542 (1931). By contrast, it would appear that Massachusetts characterizes items, such as stilettos, daggers, ballistic knives and blowguns as dangerous weapons possession of which is prohibited under G.l. c 269, s 10(b), as opposed to "arms" protected by the Second Amendment.

Often items possessed by law-abiding citizens for self defense are protected by the Second Amendment. However, that there may be a substantial number of stun guns "out there" does not compel a conclusion that stun guns are typically possessed by law abiding citizens. Moreover, there may well be another question of fact at a trial as to whether the particular device at issue here even fits the definition of a stun gun.[1] More importantly, in this case the defendant was not at home when she was arrested, but was passenger in a car outside a supermarket. Thus, we need not address whether a stun gun may be possessed within one's home.

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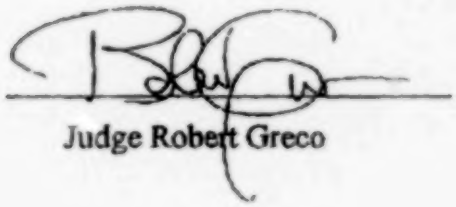
[1]Compare *Commonwealth v. Sampson*, 383 Mass.750, 754-755, fn. 6. (1981), involving different items, where the SJC noted that "[i]n contrast to signalflare devices, tear gas guns are weapons by design, in that their purpose is to subdue or incapacitate temporarily. In cases involving convictions under firearms statutes for unlawfully carrying or using tear gas guns, the issue has been not whether the instrument was a weapon, but whether it was a weapon sufficiently capable of discharging explosives or bullets so as to come within the applicable statutory or common law definition of firearm.

Based upon the above, the motion to dismiss is denied.

April 29, 2013



Judge Robert Greco

Appendix D

Massachusetts General Laws
Chapter 140, Section 131J,
as amended through St. 2004, ch. 170, §1

No person shall possess a portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill, except: (1) a federal, state or municipal law enforcement officer, or member of a special reaction team in a state prison or designated special operations or tactical team in a county correctional facility, acting in the discharge of his official duties who has completed a training course approved by the secretary of public safety in the use of such a devise or weapon designed to incapacitate temporarily; or (2) a supplier of such devices or weapons designed to incapacitate temporarily, if possession of the device or weapon is necessary to the supply or sale of the device or weapon within the scope of such sale or supply enterprise. No person shall sell or offer for sale such device or weapon, except to federal, state or municipal law enforcement agencies. A device or weapon sold under this section shall include a mechanism for tracking the number of times the device or weapon has been fired. The secretary of public safety shall adopt regulations governing who may sell or offer to sell such devices or weapons in the commonwealth and governing law enforcement training on the appropriate use of portable electrical weapons.

Whoever violates this section shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less than 6 months nor more than 2 1/2 years, or by both such fine and imprisonment. A law enforcement officer may arrest without a warrant any person whom he has probable cause to believe has violated this section.

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

Supreme Court, U.S.
FILED
JUN 0 1 2015
OFFICE OF THE CLERK

COMMONWEALTH OF MASSACHUSETTS,
Respondent

V

JAIME CAETANO,
Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

DECLARATION OF MEMBER OF SUPREME COURT BAR REGARDING DETAILS OF MAILING UNDER RULE 29.2

I, Benjamin H. Keehn, state as follows:

1. I am a member of the Bar of the Court.

2. On June 1, 2015, I mailed a copy of the petition for writ of certiorari in the above-entitled case to Scott S. Harris, Clerk, United States Supreme Court, Supreme Court Building, One First Street N.E., Washington, D.C. 20543. The mailing was first-class postage pre-paid, and was effectuated by deposit of said petition in the United States Post Office at the Fort Point Station, 25 Dorchester Avenue, Boston, Massachusetts 02205-9761.

3. The aforementioned mailing took place on Monday, June 1, 2015, which, when computed and extended pursuant to Rule 30.1, is

90 days from March 2, 2015, the date on which the Supreme Judicial Court of Massachusetts released its opinion affirming the conviction of the petitioner sought to be reviewed, and the filing of the petition was therefore within the time permitted by Rule 13.1.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 1, 2015.

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Counsel of Record for the Petitioner

CERTIFICATE OF SERVICE

I, Benjamin H. Keehn, counsel for the petitioner in this case, hereby certify that on this 1st day of June, 2015, in compliance with Rule 29.3 of this Court, I served a copy of the foregoing "Declaration of Member of Supreme Court Bar Regarding Details of Mailing Under Rule 29.2" upon all parties required to be served, by mailing the same, with first-class postage prepaid, and by transmitting by electronic mail the same, to the offices of the following:

Randall E. Ravitz
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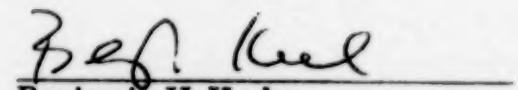

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 14-

COMMONWEALTH OF MASSACHUSETTS,
Respondent

V

JAIME CAETANO,
Petitioner

Supreme Court, U.S.
FILED
JUN 0 1 2015
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

CERTIFICATE OF SERVICE

I declare that on this date, June 1, 2015, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari on counsel for each party to the above proceeding, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them, with first-class postage prepaid, and by electronic mail.

The names and addresses of those served are as follows:

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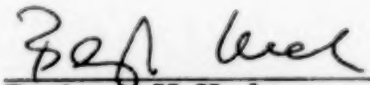
I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 1, 2015.



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RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
OCT 13 2015
OFFICE OF THE CLERK

No. 14-10078

In the
Supreme Court of the United States

JAIME CAETANO,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

On Petition For A Writ Of Certiorari
To The Massachusetts Supreme Judicial Court

BRIEF IN OPPOSITION

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October 13, 2015

QUESTIONS PRESENTED

1. Whether electric stun guns qualify as "arms" protected by the Second Amendment.

2. Whether the petitioner's conviction under Mass. Gen. Laws ch. 140, § 131J, which prohibits civilians from possessing stun guns, violates the Second Amendment.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (Pet. App. A) is reported at 470 Mass. 774, 26 N.E.3d 688 (2015). The order and opinion of the Framingham District Court (Pet. App. C) are unreported.

JURISDICTION

The judgment of the Supreme Judicial Court was entered on March 2, 2015. The petition for a writ of certiorari was filed on June 1, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. Massachusetts prohibits the possession and sale of portable devices or weapons "from which an electrical current, impulse, wave or beam may be directed," when the "current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill." Mass. Gen. Laws ch. 140, § 131J. The law exempts law enforcement personnel who possess such weapons in the course of their official duties, provided they have completed an approved training course. *Id.* It also exempts suppliers of such weapons, if possession is "necessary to the supply or sale of the device or weapon" to law enforcement agencies. *Id.* Portable electrical weapons sold pursuant to Section 131J must "include a mechanism for tracking the number of times the device or weapon has been fired." *Id.*

2. On September 29, 2011, police officers in Ashland, Massachusetts were dispatched to a grocery store in response to a call about a possible shoplifting. The store's manager identified the petitioner, Jaime Caetano, and a male companion as

possible perpetrators. The petitioner, who was seated in a car in the parking lot, gave the officers consent to search her purse. Inside the purse they found an operational stun gun.[1] The petitioner told the officers that she kept it for protection against a former boyfriend. As a result of her possession of the stun gun, the police charged her with a violation of Section 131J.[2] *Commonwealth v. Caetano*, 470 Mass. 774, 775, 26 N.E.3d 688, 689 (2015).

3. Before trial, the petitioner moved to dismiss the charge, contending that Massachusetts's ban on stun gun possession abridged her right to keep and bear arms, as guaranteed by the Second Amendment, *see District of Columbia v. Heller*, 554 U.S. 570 (2008), and as made applicable to the states by the Fourteenth, *see McDonald v. City of Chicago*, 561 U.S. 742 (2010).[3] *Caetano*, 26 N.E.3d at 690. The motion was denied. *Id.*; Pet. App. C.

During a jury-waived trial, the petitioner testified that she kept the stun gun for protection against an abusive former boyfriend. *Caetano*, 26 N.E.3d at 690. She also testified that she had been homeless and had lived in a hotel at the time she

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[1] The petitioner's stun gun "was a black electronic device with two metal prongs and a switch. Once the switch was thrown, an electrical current appeared between the prongs. Stun guns are designed to stun a person with an electrical current after the prongs are placed in direct contact with the person and the switch is thrown." *Commonwealth v. Caetano*, 470 Mass. 774, 775 n.2, 26 N.E.3d 688, 689 n.2 (2015).

[2] A violation of Section 131J may result in "a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less than 6 months nor more than 2½ years, or by both such fine and imprisonment." Mass. Gen. Laws ch. 140, § 131J.

[3] The parties stipulated at trial that the stun gun was a device that fell within the ambit of Section 131J. *Caetano*, 26 N.E.3d at 690.

obtained it. *Id.* The trial judge found her guilty and eventually placed the case on file, over her objection.[4] *Id.* She filed a notice of appeal, and the Supreme Judicial Court ("SJC") granted her request for direct appellate review.

4. The SJC affirmed the petitioner's conviction, rejecting her contentions that the Second Amendment guarantees her the right to possess a stun gun and that Section 131J is therefore unconstitutional as applied to her. *Caetano*, 26 N.E.3d at 689; Pet. App. A. The key question, the SJC recognized, was whether a stun gun is "the type of weapon that is eligible for Second Amendment protection." *Caetano*, 26 N.E.3d at 689. *Heller* and *McDonald*, the SJC noted, held that the possession of operative firearms in the home for self-defense is the "core" right protected by the Second Amendment, and that there are certain permissible limitations on the right. *Id.* at 691. The SJC focused in particular on one "'important limitation on the right to keep and carry arms'" identified in *Heller*: That the "'sorts of weapons protected'" by the Second Amendment are those that were "'in common use at the time' of enactment." *Id.* at 692 (quoting *Heller*, 554 U.S. at 627). That limitation on the scope of the Second Amendment, as *Heller* explained, was "'fairly supported by the historical tradition of prohibiting [the] carrying of dangerous and unusual weapons.'" *Id.* at 692 (quoting *Heller*, 554 U.S. at 627).

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[4] Massachusetts Rule of Criminal Procedure 28(e) describes the process that must be followed when a case is placed "on file." *See generally Commonwealth v. Simmons*, 448 Mass. 687, 693, 863 N.E.2d 549, 554–55 (2007) (explaining the process of placing a case on file and characterizing it as "a predecessor to modern probation").

Applying that limitation, the SJC determined that "there can be no doubt that a stun gun was not in common use at the time of enactment," and therefore "is not the type of weapon that is eligible for Second Amendment protection." *Caetano*, 26 N.E.3d at 693. Unlike handguns, whose "basic function has not changed" since "the time of the enactment of the Second Amendment," the SJC explained, the stun gun is "a thoroughly modern invention." *Id.* at 693–94. The SJC also concluded that the stun gun is both dangerous and unusual. *Id.* at 692–94. At common law, the SJC reasoned, the stun gun would have been regarded as "dangerous per se" because it is designed "'for the purpose of bodily assault or defense.'" *Id.* at 692–93 (quoting *Commonwealth v. Appleby*, 380 Mass. 296, 303, 402 N.E.2d 1051, 1056 (1980)). And the stun gun is an unusual weapon, the SJC continued, because it was not in existence at the time the Second Amendment was enacted and because the number of stun guns in circulation today "is dwarfed by the number of firearms." *Caetano*, 26 N.E.3d at 693–94 (internal quotation marks omitted).

Because Section 131J did not burden a Second Amendment right, the SJC applied rational basis review to assess its constitutionality. *Caetano*, 26 N.E.3d at 694. Stun guns, the SJC observed, cause "disabling pain, uncontrolled muscular contractions, and general disruption of the central nervous system" by shocking a victim with an electrical charge of up to 50,000 volts. *Id.* Unlike handguns, stun guns can be deployed without leaving marks on the victim. *Id.* The SJC determined that, in the interest of public health, safety, and welfare, Section 131J

permissibly "[r]emov[es] from public access devices that can incapacitate, injure, or kill a person by disrupting the central nervous system with minimal detection." *Id.*

ARGUMENT

This Court should deny the petition. The SJC's decision is consistent with this Court's decisions in *Heller* and *McDonald* and does not conflict with the decision of any state court of last resort or federal court of appeals. Even if the Court did wish to address the questions presented notwithstanding the need for further percolation in the lower courts, this case is not a suitable vehicle. First, the petitioner cannot obtain relief from her conviction unless this Court addresses a further question concerning the extent to which the Second Amendment protects the right to carry arms outside the home. But the particular facts of this case—involving a homeless person living in a hotel—are ill-suited for crafting a general rule on that issue. Second, the decision below is independently supportable on the ground that, even if stun guns qualify as "arms" under the Second Amendment, any burden that Section 131J imposes on Second Amendment interests is *de minimis*.

I. The Supreme Judicial Court's Decision Is Consistent With *Heller* And *McDonald*.

The SJC's determination that stun guns do not qualify as "arms" eligible for Second Amendment protection is consistent with *Heller* and *McDonald*. In *Heller* and *McDonald*, this Court held that the Second Amendment secures an individual right, incorporated against the states, to possess a handgun in the home for self-defense. *See Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 791 (plurality); *id.* at

806 (Thomas, J., concurring in part and concurring in the judgment). But *Heller* and *McDonald* also explained that the Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. Rather, "the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Heller*, 554 U.S. at 623.

Heller offered guidance on what types of weapons are protected by the Second Amendment. "[T]he Second Amendment confers an individual right to keep and bear arms," *Heller* explained, "though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia.'" 554 U.S. at 622 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)). "'[O]rdinarily when called for [militia] service'" in the colonial and revolutionary war period, the Court recounted, "'[able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'" 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179). Traditional militias were "formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* (quoting *Miller*, 307 U.S. at 179). This history illustrated how "the Second Amendment's operative clause further[ed] the purpose announced in its preface". At the time the Second Amendment was ratified, "'[small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.'" *Id.* at 625 (quoting *State v. Kessler*, 289 Or. 359, 368, 614 P.2d 94, 98 (1980)).

From this history, *Heller* derived two limitations on the types of weapons protected by the Second Amendment. First, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Second, the "sorts of weapons protected" by the Second Amendment are "those 'in common use at the time'" the amendment was ratified. *Id.* at 627 (quoting *Miller*, 307 U.S. at 179). This latter limitation, the Court explained, is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual' weapons." *Id.*

A. Stun Guns Are Not The Sorts Of Weapons That Were In Common Use At The Time The Second Amendment Was Ratified.

The SJC correctly determined that, under the second limitation announced in *Heller*, a stun gun is not an "arm" covered by the Second Amendment because it is not the sort of weapon that was in common use at the time of ratification. Stun guns are, as the SJC recognized, "a thoroughly modern invention." *Caetano*, 26 N.E.3d at 693–94. First patented in 1972, they were not widely available for private purchase until the early 1990s. *Id.* They operate by shocking the intended victim with an electrical current that runs between two metal prongs. *Id.* at 689 n.2. As the petitioner concedes, a weapon designed to kill, injure, or incapacitate with electricity is not the sort of weapon that was in common use at the time the Second Amendment was ratified. Pet. 8. Nor does such a weapon have any conceivable "'relationship to the preservation or efficiency of a well regulated militia.'" *Heller*, 554 U.S. at 622 (quoting *Miller*, 307 U.S. at 178).

The SJC's reasoning does not, as the petitioner contends, conflict with *Heller*'s instruction that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 554 U.S. at 582. *Heller* rejected the notion that "only those arms in existence in the 18th century are protected by the Second Amendment," but it also made clear that the "sorts of weapons protected" by the Second Amendment are those that were "'in common use at the time'" of ratification. *Id.* at 582, 627 (quoting *Miller*, 307 U.S. at 179). Those propositions are easily reconciled: The Second Amendment is not limited to the precise models of weaponry in existence at the time of the founding, but neither does it protect novel weapons or weapons with features that bear scant resemblance to weapons that were common at the time of ratification. *Cf. State v. Delgado*, 298 Or. 395, 400, 692 P.2d 610, 612 (1984) ("The appropriate inquiry . is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during . . the revolutionary and post-revolutionary era.").

It follows that modern-day handguns, which resemble 18th and 19th century pistols and revolvers and have long been regarded as "the quintessential self-defense weapon," qualify as arms under the Second Amendment. *Heller*, 554 U.S. at 629. But "M-16 rifles and the like"—whose features do not resemble the features of lawful firearms that founding-era Americans carried at home and on militia duty—"may be banned." *Id.* at 627; *see Friedman v. City of Highland Park, Ill.*, 784

F.3d 406, 410 (7th Cir. 2015), *cert. pending*, No. 15–133 (upholding municipal ordinance banning possession of assault weapons and large capacity magazines, which have "features . . . [that] were not common in 1791").

Stun guns and other portable electrical weapons fall in the second category. Because stun guns kill, injure, and incapacitate victims with electricity, leaving little to no trace of their use, they are a wholly distinct sort of weapon, one that has no 18th-century analogues. It is no answer to say, as the petitioner does, that stun guns can be kept in a location easily accessible in case of emergency and can be used by persons lacking the upper-body strength to lift a heavier weapon. Pet. 9. Those features bear on the utility of such weapons, not on the factors with which *Heller* was concerned. And they are shared by short-barreled shotguns—weapons that, *Miller* held, and *Heller* confirmed, are not protected by the Second Amendment. *See Heller*, 554 U.S. at 622, 625; *Miller*, 307 U.S. at 178–79. Accordingly, the SJC's determination that stun guns are not arms protected by the Second Amendment follows directly from *Heller*.[5]

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[5] Similarly, the SJC's reasoning is not, as the petitioner contends, inconsistent with *Heller*'s citation to a 1771 dictionary definition of "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 554 U.S. at 581 (quoting 1 T. Cunningham, A New and Complete Law Dictionary (1771)). Taken literally, that definition would encompass short-barreled shotguns and M-16 rifles, weapons that are not protected by the Second Amendment. *Id.* at 625, 627. The 1771 definition provides a starting point for *Heller*'s analysis of which weapons constitute "arms"; it must be read in light of *Heller*'s subsequent discussion of the limitations on the types of weapons protected by the Second Amendment.

B. Stun Guns Are Among Those Dangerous And Unusual Weapons That May Be Prohibited Consistent With The Second Amendment.

The common law "tradition of prohibiting the carrying of 'dangerous and unusual' weapons" further supports the SJC's determination that stun guns are not protected by the Second Amendment. *Heller*, 554 U.S. at 627 *Heller* invoked that tradition in aid of its conclusion that only the sorts of weapons commonly used at the time of ratification are covered by the Second Amendment. *See id.* (citing, among other sources, 4 Commentaries on the Laws of England 148–49 (1769) ("The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.")).

At common law, as the SJC explained, weapons that were "'designed and constructed to produce death or great bodily harm' and 'for the purpose of bodily assault or defense'" were "dangerous per se." *Caetano*, 26 N.E.3d at 692 (quoting *Appleby*, 402 N.E.2d at 1056). Examples of such weapons include "'firearms, daggers, stilettos and brass knuckles' but not 'pocket knives, razors, hammers, wrenches and cutting tools.'" *Id.* (quoting *Appleby*, 402 N.E.2d at 1056). Stun guns—like daggers, stilettos, and brass knuckles—are designed for the purpose of bodily assault, and therefore rank as dangerous. Indeed, accounts of people tragically tortured and killed by stun guns and other portable electrical weapons are all too common, particularly given the small numbers of stun guns in circulation. *See, e.g.*, *Thomas v. Nugent*, 539 Fed. Appx. 456 (5th Cir. 2013), *vacated and remanded*, 134 S. Ct. 2289 (2014); *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318

(4th Cir. 2013); *Russell v. Wright*, 916 F Supp. 2d 629 (W.D. Va. 2013); *Lee v. Metropolitan Govt. of Nashville & Davidson Cnty.*, 596 F Supp. 2d 1101 (M.D. Tenn. 2009); *Neal-Lomax v. Las Vegas Metropolitan Police Dept.*, 574 F. Supp. 2d 1170 (D. Nev. 2008); *People v. MacCary*, 173 A.D.2d 646 (N.Y. App. Div. 1991). And courts have had little trouble concluding that stun guns are dangerous weapons. *See, e.g., United States v. Agron*, 921 F.2d 25, 26 (2d Cir. 1990) (per curiam); *United States v. Wallace*, 800 F.2d 1509, 1513 (9th Cir. 1986); *State v. Geier*, 484 N.W.2d 167, 171–72 (Iowa 1992); *MacCary*, 173 A.D.2d at 647.

Stun guns are also unusual. Viewed from the perspective of the common law or of ratification-era America, stun guns were not just uncommon—they were nonexistent. *See supra*, at 7; *Caetano*, 26 N.E.3d at 693–94. Viewed from today's perspective,[6] stun guns are quite rare: As of 2009, approximately 200,000 civilians owned stun guns,[7] compared with approximately 30% of Americans who personally

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[6] It is unlikely that *Heller* intended for courts to look to present-day popularity of weapons to determine whether they are "unusual," as that concept was understood at common law. Doing so would imply that weapons could gain and lose Second Amendment protection as their popularity waxes and wanes. *See Friedman*, 784 F.3d at 408 ("During Prohibition the Thompson submachine gun . . . was all too common in Chicago, but that popularity didn't give it a constitutional immunity from the federal prohibition enacted in 1934."). In any event, the question whether a weapon is an "arm" under the Second Amendment does not turn on whether it is "dangerous and unusual." The rule that "the sorts of weapons protected were those 'in common use at the time'" of ratification, *Heller* said, "*is fairly supported by* the historical tradition of prohibiting the carrying of 'dangerous and unusual' weapons." 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179) (emphasis added). *Heller* did not say that a weapon's dangerousness and unusualness is a standalone test for determining whether it is an "arm" covered by the Second Amendment.

[7] *See* E. Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 212 (2009).

owned guns in the same time period.[8] As the petitioner conceded below, "the 'number of Tasers and stun guns is dwarfed by the number of firearms.'" *Caetano*, 26 N.E.3d at 693 (quoting petitioner's motion to dismiss).

II. The Supreme Judicial Court's Decision Does Not Conflict With The Decision Of Any State Court Of Last Resort Or Federal Court Of Appeals.

The petitioner alleges no conflict between the decision below and a state court of last resort or federal court of appeals that warrants this Court's review. She cites only two decisions that, she claims, conflict with the SJC's decision. *See* Pet. 8 (citing *State v. DeCiccio*, 315 Conn. 79, 105 A.3d 165 (2015); *People v. Yanna*, 297 Mich. App. 137, 824 N.W.2d 241 (2012)). The first decision, involving a ban on dirk knives and police batons, is readily distinguishable. The second decision, rendered by an intermediate appellate court, does not create a split with a state court of last resort.

1. In *State v. DeCiccio*, the Connecticut Supreme Court invalidated Connecticut's statute prohibiting the possession of dirk knives[9] and police batons in a motor vehicle, as applied to the defendant. *See* 105 A.3d at 209. The defendant was charged with possessing both weapons in his car while he transported them

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[8] *See* J. Jones, *Men, Married, Southerners Most Likely to Be Gun Owners*, GALLUP (Feb. 1, 2013), available at http://www.gallup.com/poll/160223/men-married-southerners-likely-gun-owners.aspx (polls conducted between 2007 and 2012).

[9] The Connecticut Supreme Court defined "dirk knife" as "a knife that is designed primarily for stabbing purposes, rather than utilitarian purposes, has a blade with sharpened edges that tapers to a point, and has a handle with guards intended to facilitate the act of stabbing or thrusting." *DeCiccio*, 105 A.3d at 178.

from a former residence to a new residence. *Id.* at 172. The court concluded that dirk knives and police batons are entitled to Second Amendment protection, and that a ban on transporting such weapons between homes does not survive intermediate scrutiny. *Id.* at 188–210.

In determining that dirk knives qualify as "arms" protected by the Second Amendment, the Connecticut Supreme Court asked whether the weapons were "'of the sort commonly used by individuals for personal defense during . . . the revolutionary and post-revolutionary era.'" *DeCiccio*, 105 A.3d at 191 (quoting *Delgado*, 692 P.2d at 612); *see also id.* at 190, 192 (examining the "traditional military utility" and "military origins" of dirk knives). After a lengthy historical analysis, the court concluded that dirk knives bear close resemblance to knives, like bayonets and swords, that "were common and were arms for militia purposes." *Id.* at 192–94. The court also reasoned that dirk knives were neither dangerous nor unusual, which "provide[d] strong support for the conclusion that dirk knives are entitled to protected status." *Id.* at 193–94.

That analysis aligns with the analysis conducted by the SJC in the decision below. Both courts examined whether the weapons at issue were of the sort commonly used in militia service and in the home for self-defense around the time of the founding. The courts simply reached different conclusions on different facts. Because dirk knives and stun guns are markedly different weapons—and because dirk knives in America date to the 1700s, while stun guns date to the mid-to-late-twentieth century—the courts reasonably arrived at differing answers on whether

the weapons are protected by the Second Amendment. Faced with the same facts, the SJC could conclude that dirk knives qualify for Second Amendment protection, while the Connecticut Supreme Court could conclude that stun guns do not.[10]

In determining that police batons qualify as "arms" protected by the Second Amendment, the Connecticut Supreme Court rejected the arguments that police batons are not typically possessed by law abiding citizens for lawful purposes, and are not the sorts of weapons commonly used at the time of ratification because they were dangerous and unusual. *DeCiccio*, 105 A.3d at 197–201. With respect to the lawful-purpose limitation announced in *Heller*, the court concluded that law-abiding citizens typically possess police batons for lawful purposes because the batons "are instruments manufactured specifically for law enforcement purposes as nonlethal weapons." *Id.* at 200. That conclusion does not conflict with the SJC's decision below: The SJC did not reach the question whether stun guns are typically possessed by law-abiding citizens for lawful purposes, because it concluded that they were not the sorts of weapons commonly used at the time of ratification. *See Caetano*, 26 N.E.3d at 693. Moreover, neither the district court nor the SJC made

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[10] Indeed, the Connecticut Supreme Court stressed that its holding was limited to dirk knives and did not address other types of weapons. *See DeCiccio*, 105 A.3d at 196 n.33 ("We emphasize that our conclusion is limited to knives with characteristics of the dirk knife at issue in the present case, and we do not decide whether the second amendment embraces knives generally. Thus, we do not consider whether the right to keep and bear arms under the second amendment extends to other types of knives, including those identified in [the challenged statute], such as switchblades and stilettos.").

any finding about whether stun guns are nonlethal weapons and whether they are specifically manufactured for law enforcement purposes.[11]

The Connecticut Supreme Court also concluded that the second limitation announced in *Heller*—that only the sorts of weapons in common use at the time of ratification are "arms" under the Second Amendment—was inapplicable because police batons had "traditional military utility" and are not dangerous and unusual. *DeCiccio*, 105 A.3d at 200–01. Departing from the method it used with respect to dirk knives, the court did not undertake a detailed historical analysis concerning whether a police baton is the sort of weapon commonly used at the time of ratification, nor whether a police baton would have been considered dangerous or unusual and therefore unprotected. *See id.* To the extent *DeCiccio* tacitly conducts the "dangerous and unusual" inquiry differently than the SJC's decision below, further percolation is warranted on the question whether a weapon may be said to have been "in common use" at the time of ratification simply because, today, it is not considered dangerous and unusual, or rather whether, as *Heller* said, a finding that a weapon is dangerous and unusual is simply further support for the conclusion that the weapon is not the type of weapon in common use by militias at the time of ratification. *See* 554 U.S. at 627

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[11] The SJC could hardly have concluded that stun guns are nonlethal, given the large numbers of civilians killed by stun guns and Tasers. *See supra*, at 10–11; Amnesty Int'l, *Less Than Lethal? The Use of Stun Weapons in US Law Enforcement* 1 (2008), available at http://www.amnesty.ch/de/themen/weitere/taser/dok/2008/taser-bericht/Taser-Report-Less-than-lethal_USA.pdf (between June 2001 and August 2008, more than 330 people in the U.S. died after being shocked by police Tasers and stun guns, and coroners listed the Taser or stun gun as the cause or contributory factor in the death in at least 50 of those cases).

DeCiccio is additionally distinguishable because it directly implicated the right to possess arms for self-defense in the home. The Connecticut Supreme Court stressed that its "analysis focuse[d] solely on whether [the challenged statute] unduly infringes on the right to keep protected weapons in the home for self-defense by prohibiting the transportation of such weapons from one home to another." *DeCiccio*, 105 A.3d at 201 n.40. The court viewed "the safe transportation of weapons" between residences as "an essential corollary of the right to possess them in the home for self-defense." *Id.* at 207. It did not, however, determine whether a ban on dirk knives and police batons that did *not* burden the right to self-defense inside the home would survive scrutiny.

Here, by contrast, the petitioner was arrested while possessing a stun gun in a car in the parking lot of a grocery store. She did not contend that she was transporting the stun gun between homes, nor did she contend that her possession of the stun gun outside a grocery store was an essential corollary of a right to possess the weapon in the home for self-defense.[12] Unlike *DeCiccio*, then, this is not a case about possession of weapons inside the home, where "the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628; *see infra*, at 17–18.

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[12] Because the petitioner lived in a hotel room at the time she was arrested, there was some debate in the courts below whether the hotel room was the defendant's "home" for Second Amendment purposes. *See Caetano*, 26 N.E.3d at 695. The SJC and district court declined to address the issue, however, because the defendant possessed the stun gun in a car parked outside a supermarket, not in her hotel room. *Id.*; Pet. App. C.

2. The petitioner also alleges a conflict between the SJC's decision below and *People v. Yanna*, which struck down a Michigan statute that prohibited the possession and sale of stun guns. *See* 824 N.W.2d at 245–46. *Yanna* does not represent the settled law of Michigan because it was decided by the Court of Appeals of Michigan, an intermediate appellate court. *See* Mich. Const. Art. 6, § 1 (establishing Michigan's three-tiered court system). The Michigan Supreme Court has not addressed whether stun guns and other portable electrical weapons qualify as "arms" under the Second Amendment or whether prohibitions on such weapons are constitutional. Were it to do so, the Michigan Supreme Court could eliminate any disagreement between the Michigan Court of Appeals and the SJC on those questions. Certiorari is therefore unwarranted. *See* Sup. Ct. Rule 10(b).[13]

III. This Case Is Not A Suitable Vehicle To Decide Whether Stun Guns Are Entitled To Protection Under The Second Amendment.

Even if this Court wished to decide whether stun guns qualify as "arms" under the Second Amendment, this case is a poor vehicle for doing so. The petitioner cannot obtain relief from this Court or the SJC unless this Court were to reach the further question whether, and to what extent, the Second Amendment

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[13] Before the Court of Appeals decided *Yanna*, the Michigan legislature revised its statute to permit possession of portable electrical weapons by individuals who have valid licenses to carry concealed pistols and have received appropriate training. *Compare* Mich. Comp. Laws § 750.224a(1)–(2) (2006) *with* Mich. Comp. Laws § 750.224a(2)(b) (2012); *see Yanna*, 824 N.W.2d at 242 n.1 ("This opinion considers *only* the complete ban implemented by the statute under which defendant was arrested, not the partial ban of the new statute."). Thus, *Yanna* only directly affected the small class of individuals arrested for possessing a portable electrical weapon in Michigan before the statute was amended.

protects possession of arms outside the home. But that issue was not the basis of the SJC's decision below, and the facts of this case would complicate this Court's review of that question.

Guided by *Heller*'s description of the Second Amendment as "the right to keep and bear arms for defense of the home," 554 U.S. at 632, the SJC has previously concluded that the unlawful possession of a firearm in a motor vehicle "does not implicate" the Second Amendment or "infringe on constitutionally protected conduct." *Commonwealth v. Gouse*, 461 Mass. 787, 802, 965 N.E.2d 774, 786 (2012). The petitioner, as mentioned, was charged with possessing a stun gun in a car parked in the parking lot of a grocery store, outside the hotel room she lived in at the time of her arrest. *Caetano*, 26 N.E.3d at 689–90. According to SJC precedent, then, the petitioner's conduct did not implicate the Second Amendment, even if the stun gun she possessed is eligible for Second Amendment protection.

Thus, in order for the petitioner to obtain relief from her conviction, this Court would have to take up the question whether, and to what extent, the carrying of an arm outside the home implicates the Second Amendment. But this case is ill-suited for addressing that issue, as it involves a defendant who, at the time of her arrest, was homeless and living in a hotel room. Given this atypical factual scenario, this case is especially fact-bound and a poor candidate for determining, as a general matter, whether, and to what extent, the Second Amendment extends outside the home.

IV Even If Stun Guns Are "Arms" Within The Meaning Of The Second Amendment, The SJC's Decision Is Independently Supportable Because Any Burden On The Exercise of Second Amendment Rights Is *De Minimis*.

Even if this Court were to grant review and conclude that stun guns are "arms" within the meaning of the Second Amendment, Section 131J is nonetheless consistent with the Second Amendment because any burden it imposes on Second Amendment interests is *de minimis*.

Since *Heller* and *McDonald*, courts have adopted a two-step test to analyze Second Amendment claims, and, applying that test, have found no Second Amendment violation where, as here, a regulation narrowly prohibits a certain type of weapon but preserves access to a wide array of other weapons. *See infra*, at 22. These courts first ask whether the challenged enactment burdens conduct falling within the Second Amendment's protection; if so, they review the challenged enactment under an appropriate level of means-end scrutiny. *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

As to the first step, *Heller* distinguished between laws that impose a substantial burden on the ability of law-abiding citizens to possess protected weapons for self-defense in the home, and laws that modestly affect ownership or use of protected weapons, but nevertheless are "presumptively lawful" or do not

infringe the right at all. *See Heller*, 554 U.S. at 626–27 & n.26 (referring to "presumptively lawful regulatory measures" such as "laws imposing conditions and qualifications on the commercial sale of arms"); *id.* at 632 ("Nothing about [eighteenth-century gunpowder storage and] fire-safety laws undermines our analysis" because "they do not remotely burden the right of self-defense as much as an absolute ban on handguns."); *id.* at 629 (distinguishing the handgun ban from colonial laws that imposed minor fines for unauthorized discharge of weapons, and stating that "[t]hose [colonial] laws provide no support for the severe restriction in the present case").[14] By making room for such "presumptively lawful" regulations and declaring that they do not impermissibly burden the Second Amendment, *Heller* foreclosed the suggestion that "any marginal, incremental or even appreciable restraint on the right to keep and bear arms [is] subject to heightened scrutiny." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012); *accord Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013).

In prohibiting civilians from possessing stun guns, Section 131J does not impose a substantial burden on the exercise of Second Amendment rights. Massachusetts affords law-abiding, responsible citizens extensive alternatives for acquiring weapons for self-defense and other lawful purposes. In particular, as a recent decision confirmed, Massachusetts residents can acquire and use "a wide

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[14] *See also Heller*, 554 U.S. at 629 (citing a nineteenth-century Alabama Supreme Court case for the proposition that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

array of firearms." *Draper v. Healey*, --- F Supp. 3d ---, 2015 WL 997424, at *7 (D. Mass. Mar. 5, 2015), *appeal filed* (Apr. 14, 2015); *see also Hightower v. City of Boston*, 693 F.3d 61, 66 (1st Cir. 2012) (explaining that, subject to certain licensing requirements, Massachusetts residents may possess several different types of firearms). Indeed, the state's Executive Office of Public Safety and Security ("EOPSS") maintains lists of hundreds firearms that, subject to certain regulations, may be made available for purchase in the Commonwealth. *See* EOPSS, Approved Firearms Roster (Sept. 2015), available at http://www.mass.gov/eopss/docs/chsb/firearms/approvedfirearmsroster05-2015.pdf. Massachusetts residents may also obtain other types of weapons for self-defense including, for example, mace and pepper spray. *See Caetano*, 26 N.E.3d at 695; Mass. Gen. Laws ch. 140, § 122D. All of these options were available to the petitioner. Accordingly, if Section 131J burdens any Second Amendment interests, that burden is *de minimis* and did not meaningfully jeopardize the petitioner's right to bear arms in self-defense.[15]

De minimis burdens, courts have recognized, are like the permissible limitations recognized in *Heller*: They do not infringe the Second Amendment. *See, e.g., Heller v. District of Columbia (Heller III)*, No. 14–7071, 2015 WL 5472555, at *6 (D.C. Cir. Sept. 18, 2015) (laws that have only a *de minimis* effect on the right to bear arms or that do not meaningfully affect individual self-defense do not impinge

[15] Furthermore, as the petitioner acknowledges, stun guns are not a preferred or common weapon for personal self-defense nationwide. *See Caetano*, 26 N.E.3d at 693–94; Pet. 11 & n.10. And, as the petitioner also acknowledges, stun guns are relatively unpopular despite the fact that only a handful of states have banned them. Pet. 11 & n.10. There could be no claim that their scarcity may be explained by a high number of bans across the nation.

on the Second Amendment); *Heller II*, 670 F.3d at 1253–55 (same); *Decastro*, 682 F.3d at 164 ("heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment"). Indeed, courts have determined that where, as here, a state narrowly prohibits a certain type of weapon in the interest of public safety, but preserves access to a wide array of other weapons, there is no Second Amendment violation. *See, e.g.*, *Draper*, --- F Supp. 3d ---, 2015 WL 997424, at *7 ("The regulation does not substantially burden the right to bear arms in self-defense in one's home because the ban on two kinds of Glock pistols in no way prevents citizens from obtaining a wide array of firearms."), *appeal filed* (Apr. 14, 2015); *Kampfer v. Cuomo*, 993 F Supp. 2d 188, 196 (N.D.N.Y. 2014) ("[B]ecause the provisions at issue attempt only to decrease in number certain firearms deemed particularly dangerous by the legislature for the sake of public safety, . they do not infringe the Second Amendment"), *appeal filed* (Jan. 14, 2014). The petitioner's conviction under Section 131J is entirely consistent with these principles.

The pending appeals in these cases provide an additional reason for this Court to deny this petition: Doing so will allow the cases to proceed to decisions in the courts of appeals, and thereby enable this Court to assess whether review is warranted after the issues are better developed at the appellate level. Decisions from the courts of appeals may produce a clear conflict, or show that this Court's guidance in *Heller* and *McDonald* has been adequate to allow the lower courts to develop and apply a consistent (and correct) body of law By contrast, granting

certiorari at this stage would "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984).[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[16] In any event, even if Section 131J were examined under means-end scrutiny, the statute would pass muster. Section 131J is substantially related to the Commonwealth's important interest in protecting the "health, safety, [and] welfare" of its citizens. *Caetano*, 26 N.E.3d at 694; *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981) ("Protection of the health and safety of the public is a paramount governmental interest."). Without leaving marks on a victim, stun guns "deliver a charge of up to 50,000 volts," causing "disabling pain, uncontrolled muscular contractions, and general disruption of the central nervous system." *Caetano*, 26 N.E.3d at 694. The Massachusetts legislature was so concerned about the dangerousness of stun guns that it banned everyone—including police officers—from carrying them when it first enacted Section 131J. *See* Massachusetts Acts and Resolves, 1986, ch. 212. And even when the legislature amended Section 131J to allow law enforcement personnel to carry stun guns, it required the compilation of data on police use of stun guns, required law enforcement personnel to undergo training before carrying stun guns, and required any stun guns sold in the state to have a device for tracking the number of times the weapon is fired. *See* Mass. Gen. Laws ch. 140, § 131J; Massachusetts Acts and Resolves, 2004, ch. 170, § 2. By permitting only well-trained law enforcement personnel, but not civilians, to possess stun guns, Section 131J is substantially related to the government's interest in protecting the public safety.

Respectfully Submitted,

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October 13, 2015

No. 14-10078

IN THE

Supreme Court of the United States

JAIME CAETANO,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29, I hereby certify that, on the date set forth below, a true copy of the accompanying Brief in Opposition was served upon all parties required to be served. Specifically, a copy was served by e-mail and by delivery to a third-party commercial carrier, United Parcel Service, for delivery the next calendar day. Service was directed to the counsel of record for the one other party to the case:

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October 13, 2015

VIA NEXT-DAY DELIVERY BY UNITED PARCEL SERVICE

Hon. Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, NE
Washington, DC 20543-0001

RE: *Jaime Caetano v. Massachusetts*, No. 14-10078

Dear Clerk Harris:

On behalf of the respondent, the Commonwealth of Massachusetts, I transmit for filing the following documents, enclosed herewith:

1. Brief in Opposition (1 original and 10 copies); and

2. Certificate of Service.

Thank you very much for your attention to this matter.

Very truly yours,

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In the Supreme Court of the United States

JAIME CAETANO,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF ARMING WOMEN AGAINST RAPE & ENDANGERMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Arming Women Against Rape & Endangerment (AWARE) is a non-profit, tax-exempt charitable organization founded in 1990 to provide information and training to enable people, particularly women, to avoid, deter, repel, or resist crimes ranging from minor harassment to violent assault.

AWARE's board members and instructors are certified to teach a wide range of self-defense techniques ranging from chemical defensive sprays to firearms. Its staff members have given presentations at the American Society of Criminology and at annual training meetings of American Society of Law Enforcement Trainers, Women in Federal Law Enforcement, and the International Women Police Association. One of its board members has published more than a hundred articles in various magazines and journals regarding the defensive use of firearms and other aspects of personal protection.

This case is of significant interest to AWARE because AWARE believes that law-abiding Americans should have the right to choose whether to defend themselves with lethal weapons or nonlethal weapons.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to this filing.

SUMMARY OF ARGUMENT

Hawaii, Massachusetts, New York, New Jersey, and Rhode Island, and cities such as Baltimore, New Orleans, Philadelphia, and Washington D.C., all ban the possession of stun guns. Yet hundreds of thousands of Americans who want to be able to defend themselves against crime possess stun guns for understandable and law-abiding reasons. Some people may have religious or ethical objections to using lethal weapons. Others may feel emotionally unable to pull the trigger of a firearm. Others may worry that children or a suicidal roommate may misuse the weapon. Still others worry that they may kill someone who they erroneously believe is an attacker.

The ruling below concludes that all these citizens lack the Second Amendment right to possess stun guns, because stun guns fit within the "dangerous and unusual weapons" exclusion recognized by *D.C. v. Heller*, 554 U.S. 570, 627 (2008). Yet the Michigan Court of Appeals in *People v. Yanna*, 297 Mich. App. 137 (2012), held that a ban on stun guns violated the Second Amendment (both as applied to the home and as applied to possession in public).

Moreover, the Connecticut Supreme Court has held that a ban on possessing dirk knives and police batons violated the Second Amendment, *State v. DeCiccio*, 315 Conn. 79 (2014), and the Connecticut court's reasoning directly conflicts with the Massachusetts court's. The Connecticut court held that such weapons should not be viewed as "dangerous and unusual" for Second Amendment purposes, because "dangerous" should be understood to mean *more* dangerous than constitutionally protected

handguns: "a category of arm that is less dangerous [than a handgun] clearly may not be prohibited." *Id.* at 122. The Massachusetts court, on the other hand, held that stun guns satisfy the "dangerous" prong of the "dangerous and unusual" exclusion, because stun guns are designed to "'incapacitate temporarily, injure, or kill'" people, Pet. App. A, at 5 (citation omitted)—something that of course is true of all weapons.

The Connecticut court also held that police batons should not be seen as "unusual," because they are routinely used by the police, and because they are "typically possessed by law-abiding citizens for lawful purposes." *DeCiccio*, 315 Conn. at 129, 133; *see also Yanna*, 297 Mich. App. at 145. The Massachusetts court held the opposite, because stun guns are much less common than handguns, did not exist in 1791, and are not weapons of warfare used by the military. This Court should grant certiorari to resolve this conflict among the lower courts.

ARGUMENT

I. The Ability to Possess Nonlethal Weapons Is an Important Aspect of the Right to Keep and Bear Arms

Five states and more than a dozen cities and towns ban the possession of stun guns. *See* Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defense Life*, 62 Stan. L. Rev. 199, 244-46 (2009). New stun gun bans have been proposed in several states. *Id.* at 246.

At the same time, "[h]undreds of thousands of tasers and stun guns have been sold to private citi-

zens, with many more in use by law enforcement officers." *People v. Yanna*, 297 Mich. App. at 144. Many thousands of these weapons are likely possessed in jurisdictions in which they are illegal, even if they were originally bought in the many states where they are legal.

The ability to possess a stun gun instead of a handgun is an important aspect of the right to keep and bear arms. Some people have religious or ethnical compunctions about killing.[2] Other religious and philosophical traditions, such as Judaism and Catholicism, believe that defenders ought to use the least violence necessary.[3] Some adherents to these beliefs may therefore conclude that fairly effective

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[2] For example, noted Mennonite theologian John Howard Yoder, noted Pentecostalist theologian David K. Bernard, and the Dalai Lama have expressed the view that while one ought not use deadly force even in self-defense, self-defense using non-deadly force is permissible. *See* John Howard Yoder, *Nevertheless: The Varieties of Religious Pacifism* 31 (1971); John Howard Yoder, *What Would You Do?* 28-31 (1983); David K. Bernard, *Practical Holiness: A Second Look* 284 (1985); Hal Bernton, *Students Urged to Shape World: Dalai Lama Preaches Peace in Portland*, Seattle Times, May 15, 2001, at B1. Some members of other religious groups, such as Quakers, share this view. *See* John Webster Gastill, *Queries on the Peace Testimony*, Friends J., Aug. 1992, at 14, 15.

[3] *See Catechism of the Catholic Church*, http://www.vatican.va/archive/ENG0015/_P7Z.HTM, at ¶ 2264; *Babylonian Talmud*, Sanhedrin 74a (I. Epstein ed., Jacob Schacter & H. Freedman trans., Soncino Press 1994); *The Code of Maimonides*, Book Eleven, The Book of Torts 197-98 (Hyman Klein trans., Yale Univ. Press 1954).

non-deadly defensive tools are preferable to deadly tools.

Still other people may feel emotionally unable to pull the trigger on a deadly weapon, even when doing so would be ethically proper.[4] Others may worry about erroneously killing someone who turns out not to be an attacker.

Still others might be reluctant to kill a particular potential attacker, for instance when a woman does not want to kill an abusive ex-husband because she does not want to have to explain to her children that she killed their father, even in self-defense. Some might fear owning a gun because it might be misused by their children or by a suicidal roommate.

Some people who do own guns may prefer to own both a firearm and a stun gun, so that they can opt for a nonlethal response whenever possible, resorting to lethal force only when absolutely necessary. And people who live in states where it is hard to get licenses to carry concealed firearms may choose to get stun guns instead. Volokh, *supra*, at 214-16.

Yet, under the ruling below, all these residents are denied their right to possess nonlethal stun guns for protection. This is a serious burden on Americans'

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[4] Thus, for instance, Liqun Cao et al., *Willingness to Shoot: Public Attitudes Toward Defensive Gun Use*, 27 Am. J. Crim. Just. 85, 96 (2002), reports that 35% of a representative sample of Cincinnati residents age 21 and above said they would *not* be willing to shoot a gun at an armed and threatening burglar who had broken into their home.

Second Amendment rights, and one that merits this Court's consideration.

II. Lower Courts Disagree on the Meaning of "Dangerous and Unusual Weapons" in *Heller*

This Court has stated that the Second Amendment does not protect "dangerous and unusual weapons," such as machine guns. *D.C. v. Heller*, 554 U.S. 570, 627 (2008). But lower courts disagree on how this applies to nonlethal and less lethal weapons, both as to the word "dangerous" and as to the word "unusual." This case perfectly illustrates this disagreement.

A. "Dangerous"

The Michigan Court of Appeals recently ruled that, because "tasers and stun guns * * * are substantially less dangerous than handguns," they do not "constitute dangerous weapons for purposes of Second Amendment inquires." *Yanna*, 297 Mich. App. at 145. Likewise, a recent Connecticut Supreme Court decision favorably cited *Yanna* in deciding that police batons and dirk knives are protected under the Second Amendment. *DeCiccio*, 315 Conn. at 123, 133. Using the same reasoning as in *Yanna*, the Connecticut Supreme Court found that, because batons and knives are far less dangerous than guns, they are not considered to be the sort of "dangerous" weapons that are excluded from Second Amendment protection. *DeCiccio*, 315 Conn. at 123, 133.

And this interpretation of "dangerous" in "dangerous and unusual weapons," as meaning "unusually dangerous," makes sense. All weapons are dangerous

in some measure, especially if one includes danger of pain and injury and not just death. When this Court articulated the "dangerous and unusual weapons" exclusion, it likely intended that "dangerous" have some independent meaning, rather than just being a restatement of an attribute that all weapons possess.

But the decision below uses a different approach. Stun guns, the Massachusetts high court concluded, qualify as "dangerous" for purposes of the "dangerous and unusual" exclusion simply because they were designed to "'incapacitate temporarily, injure, or kill.'" Pet. App. A, at 5 (citation omitted). Thus, the court essentially transformed the "dangerous *and* unusual weapon" exception into an "unusual weapon" exception. Dirk knives (which can often be deadly) and police batons (which can sometimes be deadly) would be even more clearly excluded from Second Amendment protection under the Massachusetts test—a result inconsistent with the Connecticut decision.

B. "Unusual"

Lower courts also disagree as to the meaning of "unusual" in the "dangerous and usual weapons" exclusion. The Michigan Court of Appeals concluded that stun guns were *not* unusual because they are legal in many states, are commonly used by law enforcement officers, and have been in use for decades. *Yanna*, 297 Mich. App. at 145. Similarly, the Connecticut Supreme Court concluded that police batons are not "unusual," because they are "typically possessed by law-abiding citizens for lawful purposes" (rather than being "unique to the criminal element"), and because of their "widespread acceptance * * *

within the law enforcement community." *DeCiccio*, 315 Conn. at 129, 133.

In contrast, the decision below found that stun guns *are* unusual because stun guns were "not 'in common use at the time' of enactment of the Second Amendment"; stun guns are not weapons of warfare that are "readily adaptable to use in the military"; and "the 'number of Tasers and stun guns is dwarfed by the number of firearms.'" Pet. App. A, at 5-6.

But the view that Second Amendment protection extends only to weapons in common use in 1791 was rejected by this Court in *Heller*, 554 U.S. at 582. Indeed, this Court characterized that view as "bordering on the frivolous." *Id.*; *see also* Pet. 6-9. Likewise, this Court has made clear that the "arms" protected by the Second Amendment include "weapons that were not specifically designed for military use and were not employed in a military capacity." 554 U.S. at 581.

And the view that weapons that are much less common than firearms are so "unusual" that they are outside the scope of the Second Amendment is inconsistent with *DeCiccio* and *Yanna*. Neither of those cases compared the number of dirk knives, police batons, and stun guns in private hands to the number of handguns in private hands. Rather, *DeCiccio* and *Yanna* focused on whether those weapons were owned commonly enough by the police and by law-abiding private citizens, not on the relative number of such weapons compared to handguns.

This Court should grant certiorari to resolve how the "dangerous and unusual weapons" exclusion applies to nonlethal and less lethal weapons.

CONCLUSION

For the reasons given above, this Court should grant certiorari.

Respectfully submitted,

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BRIEF FOR COMMONWEALTH SECOND AMENDMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Commonwealth Second Amendment (hereafter, "*Amicus*" or "Comm2A") is a Massachusetts based, non-profit dedicated to preserving and expanding the Second Amendment rights of individuals residing in New England and beyond. Comm2A works locally and with national organizations to promote a better understanding of the rights guaranteed by the Second Amendment to the United States Constitution. Comm2A has substantial expertise in the field of Second Amendment rights that would aid the Court.

The Court's ruling in the current case affects *Amicus* Comm2A's organizational interests, as well as those of its contributors and supporters, some of whom are directly affected by the law at issue in this case and who wish to enjoy the full exercise of their fundamental Second Amendment rights.

STATEMENT OF THE CASE

The case at bar challenges M.G.L. c. 140, § 131J; a statute prohibiting the use, and even possession, of a "stun gun." The statute defines them as any, "...portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill."

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[1] All parties have been notified in writing on or before July 30th 2015 as to the filing of this *amicus* brief and have consented. No party, or counsel thereof, to this action has assisted in writing this brief nor provided funds intended towards or assisting with the preparation of this brief.

The Electronic Defense Weapons ("EDWs") at bar are *not* "designed...to kill." Their specific purpose is to provide *non*-lethal means of self-defense at very close range, usually direct contact. These units use the temporary, localized application of electrical current to cause pain and disrupt muscle control, rendering the assailant incapable of attacking the user.

ACCEPTANCE OF FACTS

Comm2A accepts the facts as articulated by Appellant Caetano, which largely comport with Commonwealth's version of events. Appellant Caetano possessed a simple stun gun, which she was provided by an acquaintance, to protect her from an abusive ex-partner who had already beaten her so badly she required hospitalization. She subsequently had to use that stun gun, a direct-contact weapon, to protect herself from that same ex-partner when he accosted her outside her workplace and again threatened her with violence, despite his having been previously subject to restraining orders.

Subsequently, Appellant Caetano was alleged to be in association with someone suspected of shoplifting and a consented to search of Appellant Caetano's property turned up the stun gun. While no connection between Caetano and the alleged shoplifting was ever shown, she was arrested for possession of the stun gun. Appellant Caetano was subsequently convicted for violating M.G.L. c. 140, § 131J, and appeals that conviction.

This case presents this court two Constitutional questions: Are non-lethal weapons, specifically, EDWs, protected under the Second Amendment; and, if so,

does an outright ban on their possession violate the Second Amendment?

SUMMARY OF THE ARGUMENT

This brief seeks to inform the court of the legal and practical context of this case. The commonwealth's arms control scheme has been in place in various forms statutorily since about 1850, but only since 1906 has the modern scheme been in effect, where the state banned various tools useful for self-defense. Prior to 1906, Massachusetts' arms control scheme was quite consistent with the originalist understanding of the Second Amendment.

This brief analyzes 1800s case law and legislative acts to illustrate the changing nature of the Commonwealth's arms control scheme. It then provides an overview of the Commonwealth's arms control scheme at the time of Appellant's arrest to illustrate Appellant Caetano had few viable options for employing effective self-defense. Lastly, this brief reviews the technology of the stun gun and places it in context of the Second Amendment meaning of "arms."

ARGUMENT

I. THE MASSACHUSETTS ARMS CONTROL SCHEME

A. History of Arms Control in the Commonwealth

The Ante-bellum arms control statutes in the Commonwealth of Massachusetts mirrored the British law brought to the then-colonies, as interpreted in Sir John Knight's Case, 87 Eng. Rep. 75 (KB)[1686]. In

that case, the Statute of Northampton was limited "to punish people who go armed to terrify the King's subjects." In much of the Commonwealth's history, going armed while committing other crimes operated effectively as a penalty enhancement, while no specific prohibition on going armed for self-defense purposes existed. See Commonwealth v. Martin, 17 Mass. 359 (1821) illustrating the operation of the Acts of 1818, c. 124, § 1 regarding Armed Robbery; and Tully v. Commonwealth, 45 Mass. 357 (1842), illustrating the Rev. Statutes. c. 126, § 10, regarding larceny of a dwelling in the night and the extent to which Common law principles were applicable to the now statutorily-defined elements of the crime. [2]

In Chapter 194 of the Acts of 1850, the legislature passed a general statute which exceeded the common law prohibition against being armed while committing a breach of the peace or upon being arrested for a warrant:

> Section 1: Any person arrested upon a warrant of a magistrate, issued against him for any alleged offence against the laws of this Commonwealth, and any person committing any criminal offence against the laws of this Commonwealth, or any breach or disturbance of the public peace, who may, at the time of the commission of such offence, or breach or disturbance of the public peace, be arrested by any sheriff, deputy sheriff, constable or police

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[2] See Also: "MA acts of 1719-20 Ch. 0001. An Act For The Punishing And Preventing Of Dueling", "MA acts of 1835 Ch. 0140 An Act More Effectually To Suppress Riots.", et al.

> officer, in this State, and who shall, at the time of such arrest, be armed with any dangerous weapon, of the kind usually called slung shot, shall be punished by a fine not exceeding fifty dollars, or imprisonment in the common jail or house of correction for a term not exceeding one year.

Chapter 199 of the Acts of 1859 further expanded the list of weapons declared dangerous *per se* to include "metallic knuckles, billies or any other weapons of a like dangerous character, the malicious use of which would endanger life and limb." This act retained the qualifier that the statute applied solely to those going armed while committing other crimes or otherwise breaching the public peace; not to simply possessing or carrying those weapons.

Not until Chapter 172 of the Acts of 1906 was enacted was there a prohibition on simply carrying arms, and which applied to all people, regardless of the absence of criminal activity. It prohibited most commonly used arms, with an exemption license issuable to an "applicant [that] has a good reason to fear an injury to his person or property, and that he is a suitable person to be so licensed." This post-Reconstruction era statute created and imposed the blanket prohibition of carrying of arms, with limited exemption for licensure, Massachusetts has today.

Many changes to the law surrounding the carrying of arms and possession of firearms have occurred since

then.[3] The result is that Ch. 194 of the Acts of 1850 has largely morphed into M.G.L. Ch 269 § 10(b); while the firearms related statutes are consolidated in M.G.L. Ch 140, §§ 121-131 *et seq*, with certain criminal prohibitions placed in M.G.L. Ch. 269, § 10.

Relevant to the case at bar, the Colonial approach of punishing the carrying of arms only when committing a breach of peace or otherwise violating the *malum in se* statutes of the Commonwealth has been supplanted by a blanket ban on the possession and carrying of arms in the Commonwealth. There is now only an even smaller number of arms permitted at all, and then only through issuance of limited licensure exemptions to those residents deemed "suitable."

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[3] A non exhaustive list: Ch. 548, § 1, Acts of 1911; Ch. 207, § 1, Acts of 1919; Ch. 485, Acts of 1922; Ch. 284 § 4, Acts of 1925; Ch. 284, § 4, Acts of 1926; Ch. 395, § 3; Acts of 1927, c. 326, § 5; Acts of 1957, Ch. 688, § 23; Acts of 1968, Ch. 737, § 7, (now G.L. c. 140, §§ 129B, 129C and 129D); Acts of 1968, § 737. (Now at G.L. c. 269, §§ 10(a), 10(h)); Acts of 1975, c. 113, § 2; Acts of 1982 Ch. 254; Acts of 1983 Ch. 516, §§ 2, 3; Ch. 180, Acts of 1998; The Acts of 2014, Ch. 284.

B. The State of Arms Control in the Commonwealth at the Time of the Arrest of Appellant Caetano

The possession and carrying[4] of *per se* dangerous arms is largely prohibited (See G. L. Ch. 269, §10), subject to a limited licensure exemption (See G. L. Ch. 140 § 131). The court below in this case relies in part on the technicality that Appellant Caetano had other options and that "[b]arring any cause for disqualification the defendant could have applied for a license to carry a firearm. See G. L. c. 140, §§ 129B, 131 (c). In addition, again barring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license but did so when Appellant Caetano was charged and convicted. See G. L. c. 140, § 122D, inserted by St. 2014, c. 284, § 22."[5]

At the time of Appellant Caetano's arrest, there were two legal options for Appellant Caetano; carry a gun or carry a defensive spray (mace or pepper spray). At all relevant times, both options required a license; between the arguments in the court below and the decision, the license requirement for sprays was removed.

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[4] The definition of "carry" as related to arms is possession on one's person outside the home. See *Seay*, 376 Mass. at 740-42 additionally holding that common areas outside an apartment were not in "the home". Home means domicile ("...was not the defendant's home") Commonwealth v. McCollum, 79 Mass. App. Ct. 239, 258 (Mass. App. Ct. 2011)

[5] Commonwealth v. Caetano, 470 Mass. 774, 783 (2015)

At the time of Caetano's arrest, defensive sprays were statutorily classified as "ammunition," the possession and carry of was restricted to licensed individuals. A license good only for defensive spray was available to Massachusetts residents through their police department; for non residents, from the colonel of the state police. Issuance of said license would normally take between 30 and 90 days (despite the statutory requirement of 40 days) after the submission of the application.

To obtain a permit to actually carry a handgun, Appellant Caetano would have to receive a "License To Carry Firearms/Class A," without the common restrictions against carrying on her person placed on first time applicants[6] To be issued that license, Caetano would have had to pass an approved safety course, paid for by herself, and pay a one hundred dollar application fee. Appellant Caetano would have then been subjected to an arbitrary, undefined "suitability" requirement ("applicant is a suitable person to be issued such license") and would have had her license - if actually issued - "subject to such restrictions relative to the possession, use or carrying

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[6] From a civil case challenging a town with such a policy. "With three exceptions, Chief Grimes [of Weymouth, MA] "ordinarily" imposes a "target & hunting" restriction on Class A licenses for first-time applicants. (Id. ¶ 9). The three exceptions are that Chief Grimes will "usually" give unrestricted licenses to first-time applicants who are (1) members of law enforcement, (2) members of the military, or (3) "business owners who substantiate they handle large amounts of cash.'" Davis v. Grimes, 9 F. Supp. 3d 12, 18 (2014).

of firearms as the licensing authority deems proper."[7] At the time of this incident, the licensing process was taking three months or more.

Had Appellant Caetano acquired an LTC, she also would have been required to report all address changes "within 30 days of occurrence" to three authorities:

1. The authority which issued the LTC;
2. The authority for the municipality she moved to; and
3. The state Firearms Records Bureau.

The requirement is found in M.G.L. 140 §131, but that statute does not specify what address she could possibly use, as she had no fixed address at the time of the encounter with her abusive ex-boyfriend. It also does not state whether all changes within the 30 days were required to be reported, or simply any change that lasted more than 30 days[8]

The absence of a fixed address is itself a bar to licensing, as most police departments demand utility bills, a driver's license, rental contracts, etc, even though they are not statutorily required, or on the state application.

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[7] See M.G.L. c. 140, § 131.

[8] Suspensions/revocations of LTCs do occur for the reason of failing to notify the licensing authorities of an address change. See Commonwealth vs. Phillips; MA Appeals Court docket #2014-P-1530 (2014). Mr. Philips was temporarily homeless and had his LTC suspended for failing to report his address change.

The Supreme Judicial Court declared that Caetano had options other than to unlawfully possess for her own defense a stun gun; a device specifically designed to be non-lethal:

> Barring any cause for disqualification the defendant could have applied for a license to carry a firearm. See G. L. c. 140, §§ 129B, 131 (c). In addition, again barring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license. See G. L. c. 140, § 122D, inserted by St. 2014, c. 284, § 22.[9]

There are two clear errors of law in that assertion. First, the only license to carry a "firearm" under Massachusetts law is *the* License To Carry Firearms, issued under M.G.L. c. 140, § 131. The license issued under M.G.L. c. 140, § 129B is a mere Firearms Identification Card "FID", which, bizarrely, does not permit even owning "firearms" (which means "handguns" under Massachusetts law[10]), still less carrying them loaded in public. The only guns an FID Card authorizes possession of are non-"large capacity" long arms; hardly a viable means of self-defense outside the home. The court's inclusion of the FID Card as an means for Caetano to protect herself with a firearm outside her home is erroneous.

The court's second stated remedy available to Caetano was obtaining a "spray-only" FID Card. At the

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[9] Commonwealth v. Caetano, 470 Mass. 774, 783 (2015)

[10] See M.G.L. c. 140, § 121.

time of her arrest and conviction, that card was required for sprays, and was "shall issue" for a fee of twenty-five dollars. It used the same application form and had the same requirements, but for the safety course, as that used for LTCs and full FID Cards.

To obtain either of the Supreme Judicial Court's stated available remedies, Caetano, a marginally employed, homeless woman, must:

1. Successfully complete an approved safety course, usually a $75 to $125 fee (not required for a Spray Only FID Card);
2. Be deemed to be a resident of MA by her licensing authority;
3. Pay another $100 to file the license application; then
4. Be deemed suitable to be licensed to carry a gun by her licensing authority, if seeking an LTC, and;
5. Wait from one to four months to actually receive a license.

Moreover, as a first-time licensee, Caetano's LTC, if actually issued, would likely have been crippled by the "Target & Hunting" restriction commonly placed on first licenses. This would preclude her carrying a loaded firearm, which was the entire object of the exercise.

In general, applicants found unsuitable for a license to carry a firearm must bear the burden of proving they are otherwise suitable, subject to rational basis review and the Supreme Judicial Court has held there is no

Second Amendment right to carry a handgun concealed for the purposes of self-defense.[11]

The licensing authority has no duty to prove the "unsuitability" of an applicant the authority has denied. Quite the opposite; Massachusetts residents who wish to keep and carry arms bear the burden of proving "suitability" and a "good reason" to carry said arm.[12]

Even after one satisfies all the formalities and meets all the requirements, Federal case law suggests that the even holding a license is no protection against arrest. The First Circuit has upheld that police seizure of one's firearm, despite holding a facially valid license to carry, is perfectly acceptable if the officer is unable to independently verify the validity of the license.[13]

As a result of her conviction for possessing a non-lethal means of defense against a proven threat, Appellant Caetano is prohibited from possessing even a defensive spray for five years;[14] and prohibited for life from possessing any type of firearm for self-defense in

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[11] See Chief of Police of the City of Worcester v. Holden, 470 Mass. 845 (2015).

[12] See Commonwealth v. Humphries, 465 Mass. 762, 767 (2013); also, Commonwealth v. Farley, 64 Mass. App. Ct. 854, 857 (2005).

[13] Schubert v. City of Springfield, 589 F.3d 496 (1st Cir. Mass. 2009).

[14] See M.G.L. c.140 § 122D.

the Commonwealth.[15] The conviction triggers the lifetime Federal prohibition as well.[16]

C. The court below applied the wrong standard for Arms in Common use.

The court below analyzed the constitutionality of M.G.L. c. 140, § 131J by first finding that all EDWs, including Caetano's stun gun, were dangerous and unusual arms which fell outside the ambit of Second Amendment protection:

> The ban on the private possession of stun guns will not burden conduct that falls within the scope of the Second Amendment if a stun gun is a weapon not "in common use at the time" of enactment of the Second Amendment and would be dangerous per se at common law without another, primary use, i.e., as a tool. See *Heller*, 554 U.S. at 624-625, 627, quoting *Miller*, 307 U.S. at 179. For reasons that follow, there can be no doubt that a stun gun was not in common use at the time of enactment, and it is not the type of weapon that is eligible for Second Amendment protection. See *Heller*, supra at 622. [17]

It also analyzed constitutionality by looking to the stun guns' "military adaptability":

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[15] See M.G.L. c.140 § 131(d).

[16] See 18 U.S.C. 922(g); also, Caron v. United States, 524 U.S. 308 (1998).

[17] Commonwealth v. Caetano, 470 Mass. 774, 780-781 (2015)

> Even were we to view stun guns through a contemporary lens for purposes of our analysis, there is nothing in the record to suggest that they are readily adaptable to use in the military. Indeed, the record indicates "they are ineffective for ... hunting or target shooting."[18]

The Heller court noted that handguns were but one class of "weapons," and acknowledged that knives are also "arms." Both knives and guns are personal defense weapons; recognized as such by centuries of such use. Under that analysis, EDWs also constitute "arms;" moreover, they are specifically designed for personal defense. Under the same analysis which shows guns and knives are protected "arms," citizens correctly claim a right to "keep and bear" EDWs.

The Second Amendment has already been acknowledged by the *Heller* court to protect a spectrum or "class" of arms, including knives and handguns. The *Heller* court specifically applied it to modern handguns; repeating arms non-existent at the time of Ratification.

Just as the First Amendment embraces and protects new means of communication, and the Fourth Amendment protects against new technologies for intrusion and surveillance, the Second Amendment applies to new technologies. It necessarily follows that, *in pari materia*, the Second Amendment must be read to protects these new technologies; defensive sprays and Electronic Defense Weapons.

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[18] *Id.* at p. 781.

II. THE NATURE AND PURPOSE OF AN ELECTRONIC DEFENSE WEAPON

A. EDWs Are Effective Self-Defense Arms.

An Electronic Defensive Weapon (also known as Conducted Energy Weapon or Electronic Control Weapon) is an electronic device that stuns, incapacitates and/or causes significant sensations of pain to interrupt an impending attack. It uses high voltage, but low amperage, to ensure that the current needed to be effective can bridge the gap between the skin and the device's probes/contacts caused by clothing, but with no burns or likely permanent harm. When activated, the current is discharged from the stun gun in a series of very short pulses, each only milliseconds long; as opposed to a continuous discharge of current.

There are two types of Electronic Defense Weapons ("EDWs") available. The first is the traditional "stun gun," which requires direct contact with an attacker to apply the charge. The second is the "TASER" (the brand name coined by its creator); a projecting weapon using compressed gas to launch two barbed needles connected to the pistol-like launch unit via two separate thin wires. Stun guns are distinct from TASERs; the latter are distance weapons, as acknowledged by a Massachusetts court:

> A TASER is "used for a gun that **fires** electrified darts to stun and immobilize a person," Merriam-Webster's Collegiate Dictionary 1279

> (11th ed. 2003), **and differs from the weapon at issue here** [a stun gun].[19]

The *Odimegwu* court further noted the temporary nature of the effects:

> Not until the defendant opened the door on cross-examination by probing Westhaver's knowledge of the differences between TASERs and stun guns did the judge permit the prosecutor to elicit Westhaver's knowledge of the differences between TASERs and stun guns, and of **the fact that stun guns are designed to incapacitate temporarily**. *Id.* at fn. 4 (**bold** added).

Both types of EDW, when activated, cause significant, but temporary, sensations of pain and localized neuromuscular disruption; i.e. the attacker losses muscle control around the area where the contacts are placed. The significant differences between a stun gun and a TASER is that the former is far more compact and requires contact with the attacker to work. The TASER is larger because it requires a launcher, making it a "stand-off" or distance weapon.[20] Appellant Caetano possessed a simple stun gun that required physical contact with her attacker, as indicated by Appellant's lower court brief at page 4.

Electronic Defensive Weapons are categorized as "non-lethal" arms. While a death is possible from a

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[19] Com. v. Godwin Odimegwu, 08-P-1911 (2009) at fn. 2 (**bold** added).

[20] See People v. Yanna, 297 Mich. App. 137.

stun gun or TASER discharge, that is not the result they are designed for. For that reason, such incidents are uncommon, and usually involve those with pre-existing medical conditions.

TASER International routinely demonstrates the TASER on willing participants at trade shows and other events,[21] as well as its own employees.[22] Police recruits are also shocked as part of their training[23] in order to familiarize them with the effects of EDW use. This training protocol for law enforcement is on par with that employed for pepper spray use,[24] and for the same reason: familiarization with the effects.

Alternate non-lethal weapons, such as batons and billies, require impact, which causes more trauma; mace and pepper spray cause significant visual and respiratory distress and for a longer duration, with resulting possible trauma. This places EDWs at the

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[21] For an example, see https://www.youtube.com/watch?v=zxEuImiNoTc sec37-40. (last visited Oct. 15, 2014).

[22] http://www.TASER.com/about-TASER "As a measure of this commitment, TASER employees regularly undergo voluntary exposures with our various TASER CEWs. This includes our founders: Rick Smith, CEO and his brother Tom Smith, former Chairman of the Board." (last visited Oct. 15, 2014)

[23] (https://www.youtube.com/watch?v=MP9GHluE9ao, https://www.youtube.com/watch?v=J4WAsxTRJRw, https://www youtube.com/watch?v=8Ev-jroGy6U, https://www.youtube.com/watch?v=AUquJQ_OgeE (last visited Oct. 15, 2014)

[24] https://www.youtube.com/watch?v=TQqY-4MYwQc (last visited Oct. 15, 2014)

very low-harm, low-risk end of the trauma spectrum. Appellant Caetano possessed such a simple stun gun.

The United States Department of Justice publishes guidelines[25] on the use of EDWs, the primary guiding principle of which is that they be considered less lethal. Although the guidelines are directed primarily at law enforcement, the document indicates that Electronic Defense Weapons commonly used fall on the Use of Force Continuum between manual holds and deadly force.[26]

The use of these devices as pain compliance tools in a law-enforcement manner by the average citizen is unlikely; citizens use them for self-defense. The issues found in police use of EDW's are uncommon and implausible in a self-defense situation. The victims usually flee once the attackers have been neutralized, allowing the victim to escape.

B. EDWs Are Effective Self-Defense Arms.

Citizens who take self-defense seriously want to defend themselves, and those around them whom they care for, from bodily injury safely and effectively. They do not act maliciously, or in any way to intentionally harm others. Self-defense is the fundamental instinct to survive unwanted violent altercations unscathed if they can't be avoided. Their lack of lethality, yet efficacy, makes EDWs desirable as an effective defense tool, just as defensive sprays are. It also puts them in

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[25] http://cops.usdoj.gov/Publications/e021111339-PERF-ECWGb.pdf (last visited Oct. 15, 2014)

[26] Id. at p. 26.

the category of defensive arms that firearms and knives are. As such, stun guns are entitled to the same Second Amendment recognition and protection as those self-defense tools are.

This case presents as its core issue the difference in how sprays are favored under Massachusetts law, yet which criminalizes the electronic equivalent. The use of force principles for self-defense are well known and apply to non-lethal and lethal defensive tools alike; a) a reasonable belief that one is under attack or about to be, b) that the person so believing did what was reasonable to avoid the physical conflict, and c) that force was met with reasonable force.[27] Those rules do not change simply because the means of self-defense are electronic, rather than chemical or ballistic.

In her brief, Appellant Caetano described having previously been beaten so badly that she ended up in the hospital.[28] Appellant was well aware of her former partner's propensity to violence firsthand, including, as noted in another case, his "...specific violent acts or reputation for violence...[and] had a reasonable apprehension for [her] safety." Appellant's brief also cites multiple restraining orders and refers to incidents when the Appellant's former partner repeatedly violated those orders ("she described how J.A. would continually appear at her workplace to threaten and harass her").[29]

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[27] See Model Jury Instruction 9.260, 2009 Ed.

[28] Appellant's lower court (Supreme Judicial Court) Brief at pg. 5.

[29] Allen v. United States, 150 U.S. 551, 561 (1893).

Caetano's former partner precipitated the incident creating the case at bar. Her restraining order was, again, useless at stopping the abuse. Appellant's threatened use of her stun gun did:

> I said, 'I'm not gonna take this anymore. Somebody gave me this and I don't wanna have do it to you, but if you don't leave me alone, I'm gonna have to.' And he ended up leaving. I guess, got scared and left me alone.[30]

The paper wall of multiple domestic restraining orders did not stop Caetano's attacker; neither did criminal charges, a phone call to 911, or Caetano's co-workers. Appellant Caetano's stun gun, a tool - an "arm" - specifically designed for non-lethal self-defense did. It allowed Caetano to quickly halt an immediate, violent threat to her. Nothing protects a diminutive woman in the face of a raging attacker more than the evident ability to defend herself. Stun guns, an effective, non-lethal tool legal in most states,[31] but criminalized in Massachusetts, provide that empowerment and protection.

Attackers have tactical superiority; surprise and, usually, a force superior to their unarmed victim. The victims of criminals have no such advantages, and "...detached reflection cannot be demanded in the presence of an uplifted knife."[32]

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[30] Appellant's SJC Brief, pg. 6

[31] See both Commonwealth's Brief at 26 and Defendant's Brief at 12.

[32] Brown v. United States, 256 U.S. 335, 343 (1921).

> The law acknowledges exigent circumstances do not permit leisurely reflection, and does not demand a person facing an attacker; "must be regarded as exercising the deliberation of a judge in passing upon the law and of a jury in passing upon the facts, in arriving at a determination as to the existence of the danger and the necessity of using the particular means to avert it.[33]

The law requires only that the victim of an attack reasonably react as circumstances permit, and make a reasonable response to the threat as perceived, including the reasonable level of force to end the assault in the circumstances. Caetano's use of her non-lethal stun gun against a violent attacker whose previous beatings had required her hospitalization, was clearly necessary and eminently reasonable under the circumstances. That no further harm was done, to her, her attacker or society in general, is also in keeping with public policy.

Had she used a defensive spray, there would have been no charges. Because she used an electronic equivalent, she was criminally charged. That speaks volumes about the legitimacy of the statute under which she was charged. It also documents the appropriateness of EDWs as modern "arms" for self-defense, as the Yanna court so found.

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[33] People v. Yanna, 824 N.W.2d 241 (2012).

CONCLUSION

Amicus Comm2A asserts the Second Amendment's recognition of the "right of the people to keep and bear arms" is not limited to firearms, but encompasses a range of personal defensive weapons. In the case at bar, it is the class of personal defense arms known as "Electronic Defense Weapons" or EDWs.

Such weapons as pistols, knives, swords, etc., were common when the Constitution was written and ratified. The Second Amendment was conceived when these defensive arms were commonly carried, and there is no reason to believe they were not protected by the Constitution. Indeed, the Commonwealth of Massachusetts only began to ban the carrying personal defense weapons in 1906. Until then, criminal charges for the carrying weapons was interpreted per the *Sir John Knight's* case interpretation of the Statute of Northampton.

The Second Amendment has already been acknowledged by the Heller court to protect a spectrum or "class" of arms, including knives and handguns. The Heller court specifically applied it to modern handguns; repeating arms non-existent at the time of Ratification. Applying the same legal analysis by which the First and Fourth Amendments were found to apply to, and protect, new technologies, the Second Amendment also applies to, and protects, them. That means it protects not just repeating firearms, but defensive sprays and Electronic Defense Weapons.

Second Amendment protects the individual right to carry a weapon in case of dangerous confrontation. The statute case at bar, M.G.L. c. 140, § 131J, criminalizes

not just carrying EDWs, but even possessing them in one's home. This infringement of a fundamental right is subject to the same heightened scrutiny as laws restricting or prohibiting firearms are.

The statute criminalizes possessing EDWs, which are in *pari materia* with those "arms" already recognized and permitted to be both owned, and carried outside the home. This statute is subject to the same heightened scrutiny as other laws which prohibit or otherwise restrict the fundamental right to "bear arms" are.

The statute fails under that standard of review. A state which acknowledges the right to use deadly force in self-defense cannot argue that a non-lethal EDW is "dangerous and unusual;" still less that, where pepper spray is now sold over the counter, an EDW is not an "arm" suitable for self-defense. Denying people access to a proven, *non*-lethal means of self-defense serves no rational purpose; rather, it forces a choice between deadly force and defenselessness. The statute also violates the fundamental right to "bear arms."

Based upon the above analysis, *amicus* Comm2A argues that this law, M.G.L. c. 140, § 131J, is unconstitutional, both as written and as applied.

Respectfully submitted,

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NO. 14-10078

IN THE
SUPREME COURT OF THE UNITED STATES

JAIME CAETANO,
Petitioner,

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF

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A. The merits. The parties do not disagree on the substance of the two questions presented by this petition: Whether the Second Amendment protects the right of an individual to keep and carry a stun gun for purposes of lawful self-defense, and whether the petitioner's conviction under Massachusetts' statute outlawing the private possession of stun guns is compatible with the Second Amendment, as made applicable to the States by the Fourteenth Amendment. See Petition at i; Brief in Opposition at i.

On the merits, the Commonwealth contends that this case does not implicate the Second Amendment because (1) electronic weapons such as stun guns did not exist when the Second Amendment was ratified, and because (2) like the sawed-off shotgun at issue in *United States* v. *Miller*, 307 U.S. 174 (1939), stun guns are "not typically possessed by law-abiding persons for lawful purposes" and are "dangerous and unusual." Brief in Opposition at 7, citing *District of Columbia v. Heller*, 554 U.S. 570, 625, 627 (2008). Neither contention has merit.

1. It would "border[] on the frivolous" to say that stuns guns fall outside the Second Amendment for the reason that they did not exist at the time of the founding: "We do not interpret constitutional rights that way." *Heller*, 554 U.S. at 582, citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and *Kyllo v. United States*,

533 U.S. 27, 35-36 (2001). The electronic stun gun is not any more unlike the "arms" commonly used for lawful self-defense in the 18th century than the Internet "speech" held to be protected by the First Amendment in *Reno v. ACLU*, or the thermal imaging "search" held to fall within the Fourth Amendment in *Kyllo* are unlike those terms' revolutionary-era analogues. By its explicit reference to cases that have extended other provisions of the Bill of Rights to modern electronic variations of matters familiar to the Framers, *Heller* puts the electronic stun gun squarely on the continuum of "arms" covered by the Second Amendment. The petition should be granted so that the Court may make clear that, contrary to the SJC's opinion in this case, the Second Amendment right recognized in *Heller* has pertinence to the self-defense exigencies of modern American society.

2. Stun guns do not share any of the features that permit the government to criminalize the possession of such weapons as sawed-off shotguns. The sawed-off shotgun has been altered specifically to facilitate easy concealment and maximize lethality, making it "uniquely attractive to violent criminals." *Johnson v. United States*, 135 S. Ct. 2551, 2584 (2015) (Alito, J., dissenting). The stun gun, in contrast, is designed so that it will not kill or permanently injure, and is increasingly relied upon by law enforcement throughout the country and by law-abiding citizens for purposes of self-defense in the many

jurisdictions in which its possession has not been criminalized. See *Caetano v. Massachusetts*, No. 14-10078, *Brief of Arming Women Against Rape & Endangerment as Amicus Curiae in Support of Petitioner* at 2-3. Under these circumstances, any assertion that stun guns are "not typically possessed by law abiding persons for lawful purposes" amounts to a mere ipse dixit. That said, *Heller* had no occasion to amplify on what is meant in these circumstances by a weapon that is "dangerous and unusual." The petition should be granted so that the Court can clarify whether the "dangerous and unusual" limitation permits criminalizing the possession of weapons less lethal than firearms, and whether the term describes particular weapons rather than the manner in which a weapon is used or is intended to be used. Such clarification will enable the Court to explain why the SJC's conclusion below that stun guns are "dangerous and unusual" is mistaken and the Supreme Court of Connecticut's conclusion in *State v. DeCiccio,* 315 Conn. 79, 105 A.3d 165 (Conn. 2014), that dirk knives and police batons are not "dangerous and unusual" is correct.

B. Whether this case is a suitable vehicle to address questions left unanswered in *Heller*. The Commonwealth contends (1) that the petition should be denied because there is "need for further percolation in the lower courts" on what this Court meant by "dangerous and

unusual" and (2) that the petitioner's homelessness makes this case a poor candidate for certiorari review. Brief in Opposition at 5. Neither point has merit.

As *Heller* sought to make clear over seven years ago, "'[s]elf-defense is a basic right' and 'central component' of the Second Amendment's guarantee of an individual's right to keep and bear arms." *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting from denial of certiorari), quoting *McDonald v. Chicago*, 561 U. S. 742, 767 (2010). Notwithstanding "the clarity with which [this Court] described the Second Amendment's core protection for the right of self-defense, lower courts, including [the SJC] here, have failed to protect it." *Jackson v. City & County of San Francisco*, 135 S. Ct. at 2799 (Thomas, J., dissenting from denial of certiorari). In stating explicitly that it will "not extend the Second Amendment right articulated by *Heller* to cover stun guns" unless and until it receives "further guidance from [this Court] on the scope of the Second Amendment," *Commonwealth v. Caetano*, 470 Mass. 774, 779, 26 N.E.3d 688, 692 (2015), the SJC joins the many post-*Heller* courts which have made clear that no amount of lower court percolation will avail individuals like the petitioner here who seek the constitutional protection which *Heller* clearly requires.

Indeed, this case perfectly illustrates why the "further guidance" implicitly requested by the SJC from this Court is in fact necessary. This is a self-defense case. The petitioner is a diminutive woman who was prosecuted and convicted for possessing a stun gun which she obtained and employed to protect herself against further physical violence at the hands of her abuser. These facts are not disputed. Nonetheless, the sum and substance of Massachusetts' response to the petitioner's undisputed claim to her "ancient" right of armed self-defense, *Heller*, 554 U.S. at 599, is that she should have gotten herself a handgun or some pepper spray. 470 Mass. at 26 N.E.3d at 695; Brief in Opposition at 21. But, as the SJC elsewhere acknowledges, by affirming the petitioner's conviction, it has upheld Massachusetts's statutory prohibition of "a class of weapons entirely." 470 Mass. at 779, 26 N.E.3d at 692. And *Heller* itself makes clear that the Second Amendment does not permit a state to ban one class of protected arms by offering its citizens another more to its liking. *Heller*, 554 U.S. at 629. Thus, the question whether stun guns are Second Amendment "arms" could not be more starkly presented.

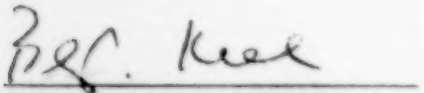
Nor does the petitioner understand why her homelessness could be an appropriate reason to deny this petition. The Commonwealth states that the petitioner's homelessness makes her case "atypical." Brief in Opposition at 18. Regrettably, this is not so. See generally,

U.S. Department of Housing and Urban Development's 2010 Annual Homeless Assessment Report to Congress (available at https://www.hudexchange.info/resources/documents/2010HomelessAssessmentReport.pdf) (last visited October 27, 2015). Moreover, the statute under which the petitioner was prosecuted and convicted draws no distinction between possession of a stun gun in the home and elsewhere. Thus, the operative facts of this case again raise the important question whether the right recognized in *Heller* is a "second-class right," *McDonald*, 130 S. Ct. at 3044, that is available to some citizens – e.g., those who have a hearth and home to protect – but not to others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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